OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-578-946

ISSUES

Whether Claimant's case should be reopened based upon the failure of Dr. Dixon to provide an impairment rating for Claimant's thoracic spine pursuant to the principles of the AMA Guides to the Evaluation for Permanent Impairment, Third Edition Revised.

FINDINGS OF FACT

1. On or about April 10, 2002, Claimant injured her right upper back (thoracic spine) and the right lateral anterior chest wall after maintaining a static position while holding bottles of chemicals to create a hydrofluoric acid bath utilized in a manufacturing process performed for the Respondent-Employer.
2. On April 11, 2002, Claimant was evaluated in the offices of Dr. Ronald Peveto who noted that Claimant had spent "a total of about forty minutes with her arms outstretched holding chemicals to replace the bath. The chemicals were held under a chemical ventilation hood with her arms outstretched. She is uncertain of the weight of the vials she was pulling (sic) into the bath but these vials weighed several pounds".
3. Claimant developed increasing discomfort in her right back area with pain and spasms radiating upward into her cervical neck intermittently following this activity.
4. At his initial visit, Dr. Peveto provided an assessment (diagnosis) of "thoracic back and chest wall strain"
5. Liability for the injury was admitted and the Claimant began regular treatment with Dr. Peveto.
6. Dr. Peveto evaluated the Claimant in the clinical setting on numerous occasions including, April 15, 2002, April 29, 2002, June 6, 2002, August 27, 2002, October 11, 2002, December 3, 2002, January 9, 2003, February 13, 2003, February 27, 2003, April 22, 2003, August 11, 2003 and September 12, 2003.
7. The listed diagnosis for Claimant under Dr. Peveto's record dated April 15, 2002 was "thoracic, back and chest wall strain and right shoulder strain". On his April 29, 2002 visit, Dr. Peveto provided an assessment of "thoracic back and chest wall strain and right shoulder strain, improved". On June 6, 2002, Dr. Peveto provided an assessment of "thoracic back and chest wall strain, right shoulder strain now with some cervical neck discomfort". Dr. Peveto's August 17, 2002 note provided a diagnosis of "right shoulder and upper back strain, improving". The October 11, 2002 report authored by Dr. Peveto provides an assessment of "right shoulder and upper back strain, continuing to improve". On December 3, 2002, Dr. Peveto provided an assessment of "status post thoracic back, chest wall, and right shoulder strains".
8. As of the October 11, 2002 date of visit, Dr. Peveto opined that the Claimant had reached maximum medical improvement and had been discharged from his care.
9. The December 3, 2002 note of Dr. Peveto is very lengthy and outlines the Claimant's ongoing symptoms with regard to her upper back, and right shoulder. Dr. Peveto recommended that Claimant "have some chiropractic treatment". On this date of visit,

Dr. Peveto noted that the Claimant's right shoulder had never been completely imaged. Therefore, Dr. Peveto recommended an MRI of Claimant's right shoulder to further evaluate her continued complaint of right shoulder pain. On this visit, Dr. Peveto rescinded maximum medical improvement.

10. Beginning with the January 9, 2003 note, the assessment (diagnosis) offered by Dr. Peveto changed to "continued right shoulder discomfort with evidence of supraspinatus tendonitis".

11. Following her January 9, 2003 visit, Claimant continued to treat with Dr. Peveto with the focus of treatment on her right shoulder discomfort and supraspinatus tendonitis. During this time frame, Claimant continued to experience upper back symptoms and it is noted in Dr. Peveto's February 27, 2003 note that Claimant continues to see "Dr. Leahy or one of his associates" who had recommended an additional four visits to address Claimant's ongoing pain symptoms.

12. On April 22, 2003, Dr. Peveto discharged the Claimant from additional care. However, on August 11, 2003, Claimant returned to Dr. Peveto with complaints of persistent symptoms. Dr. Peveto noted on August 11, 2003 note that Claimant "continued to complain of some discomfort in her right shoulder and cervical neck but very little discomfort in her chest by August 1, 2002". Furthermore, Dr. Peveto noted that Ms. Tucker "indicated that on 10/11/02, she was still having some right shoulder and upper back discomfort off and on". In his August 11, 2003 note, Dr. Peveto noted that the "patient returned on 12/3/02 indicating that she had increased discomfort in her right shoulder". The medical records submitted at hearing document a change in focus of Claimant's treatment to her right shoulder at approximately this time.

13. Claimant testified that she remains symptomatic with regard to her upper back, shoulder and neck areas.

14. Claimant has never had the benefit of an MRI to her thoracic spine. However, Claimant has undergone thoracic x-rays, which were performed on October 21, 2004. The x-rays demonstrated mild mid thoracic osteoarthritis. The indications for completing the x-rays on October 21, 2004 were Claimant's ongoing complaints and "history of neck and back pain."

15. Dr. Mary Dixon assumed Claimant’s care. On October 25, 2004, Claimant was provided an impairment rating by Dr. Dixon for her right shoulder. Dr. Dixon provided Claimant an impairment rating of 4% upper extremity for range of motion deficits. Dr. Dixon did not address any impairment for Claimant's thoracic spine despite the x-ray report demonstrating degenerative changes dated October 21, 2004.

16. On November 18, 2004, Respondents filed an Amended Final Admission of Liability admitting to the 4% impairment rating rendered by Dr. Dixon.

17. Claimant had relocated to Cleburne, Texas by the time the Amended Final Admission of Liability was filed. Claimant continued to receive treatment for her thoracic spine following her relocation to Cleburne, Texas.

18. Claimant did not object to Respondents' Final Admission of Liability and the claim was administratively closed due to lack of an objection.

19. Claimant has been evaluated by Dr. Timothy Hall who has opined that Claimant is in need of ongoing treatment for her residual symptomology caused by her industrial injury. Furthermore, Dr. Hall opined that Dr. Dixon's failure to provide Claimant with an impairment rating for her thoracic spine constituted a mistake as the AMA Guide to the

Evaluation of Permanent Impairment, 3rd Edition Revised were not followed in this case by Dr. Dixon.

20. Dr. Dixon opined that Claimant did not suffer an injury to her thoracic spine and therefore was not entitled to an impairment rating under the AMA Guidelines to the Evaluation of Permanent Impairment, Third Edition Revised for the same. The ALJ finds Dr. Dixon's opinion to be the more credible opinion and carries greater weight.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. Claimant seeks to re-open her case on the grounds of "error or mistake," arguing that the treating physician's determination of maximum medical improvement was an "error or mistake" to the extent that no MRI of the thoracic spine was accomplished along with additional treatment as necessary and no impairment rating was provided for Claimant's thoracic spine.

4. Section 8-43-203(2)(b)(II), C.R.S., provides that a claim will be automatically closed "as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the admission in writing and request a hearing on any disputed issues that are ripe for hearing." The term "issues admitted" refers to issues on which the employer has affirmatively taken a position, either by agreeing to pay benefits or by denying liability. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). Section 8-43-203(2)(d), C.R.S., provides that once a case is closed under subsection (2) "the issues closed may only be reopened pursuant to section 8-43-303." An issue is "ripe" for adjudication when it is real, imme-

diate and fit for adjudication. *Olivas-Soto v. Industrtial Claim Appeals Office,* __P.3d__ (Colo. App. No. 05CA2509, August 24, 2006). The courts and the Industrial Claim Appeals Office have treated these provisions as jurisdictional. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *Dalco Industries, Inc. v. Garcia,* 867 P.2d 156 (Colo. App. 1993); *Lam v. Royal Crest Dairy,* W.C. No. 4-506-429 (I.C.A.O. November 4, 2005).

5. In this case, Claimant should have asked for a DIME if she took issue with the diagnostics and treatment provided. She is now seeking to circumvent the finality of the case closure process by relying on a theory of mistake or error. However, Claimant was in possession of the information she now relies upon at the time of being placed at MMI. Any disagreement based upon those facts requires the Claimant to request a DIME to dispute the treating physician's conclusions.

6. Claimant has failed to provide any other evidence of "error or mistake" to justify the re-opening of her case other than the "error or mistake" of the authorized treating physician.

ORDER

It is therefore ordered that:

Claimant's Petition to Re-open her case is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATE: April 30, 2009
/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-704-954

ISSUE

The issue for determination is the average weekly wage (AWW) for the period of disability commencing on November 4, 2008.

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on November 6, 2006. At a prior hearing in this matter on February 18, 2008, the parties stipulated that Claimant's AWW based upon the wages at Employer was $323.50. At the prior hearing, temporary total

disability benefits were sought for the period from November 14, 2006, through April 23, 2007.

2. Claimant did not work from November 14, 2006, until April 23, 2007. On April 23, 2007, Claimant was released to regular duty. Claimant sought and obtained employment with a subsequent employer. Claimant earned, on average, more wages at the subsequent employer than she did with Employer.

3. On November 4, 2008, Claimant underwent surgery on her right shoulder. Insurer admitted liability for temporary total disability benefits commencing on that date. This is the first payment of temporary disability benefits on this claim.

4. Claimant began employment with the subsequent employer on May 14, 2007. After May 14, 2007, Claimant did not work at the subsequent employer for: (1) a three week period in January 2008 when Claimant was off-work to care for her child who had Chicken Pox; and (2) from June 11, 2008, through August 19, 2008, when Claimant was off-work for a foot surgery that is not related to this claim. These events represent an abnormal departure from work, and are not expected to reoccur.

5. Claimant's AWW for the period commencing on November 4, 2008, is fairly computed by calculation of average pay at the subsequent employer for the time she actually was working.

6. From May 14, 2007, to November 4, 2008, Claimant worked for the subsequent employer for 450 days. She earned $26,252.73, an average of $58.34 per day. Her average wage per week that she worked was $408.38.

CORRECTED CONCLUSIONS OF LAW

1. Respondents argue that Claimant is bound by the stipulation she reached as to the AWW at the February 2008 Hearing by operation of *res judicata* or issue preclusion.

2. The issue at that hearing is different than the issue to be determined at this hearing. At the February 13, 2008, hearing, the period of temporary disability benefits sought was November 2006 through April 2007, before this period of disability had began in November 2007. Claimant was released to regular duty in April 2007 and she has not claimed any disability after that release until November 2008.

3. The AWW that should be used for determining temporary disability benefits from November 4, 2008, ongoing was not litigated at the prior hearing.

4. An injured worker's AWW is to be based on his or her earnings at the time of injury. Section 8-42-102(2), C.R.S., However, the discretionary exception in Section 8-42-102(3), C.R.S. (2008), provides that the ALJ, in each particular case, may compute the average weekly wage in such a manner and by such method as will, in the opinion of the ALJ, fairly determine the employee's AWW. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008),

5. The ALJ may determine a claimant's TTD rate based upon earnings the claimant received on a date other than the date of injury. *Pizza Hut v. Industrial Claim Appeals Office,* 18 P.3d 867 (Colo.App. 2001); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo.App. 1993). Where an injured worker's earnings change, the AWW may be calculated based upon earnings during prior to a period of disability. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp.*, *supra*.

6. Here, Claimant was released to return to work and located employment with a subsequent employer. She earned more with the subsequent employer. She became

temporarily and totally disabled again when she had surgery on November 4, **2008**. Her average weekly wage fairly calculated based upon her earnings at that subsequent employer before this latest period of disability.

7. Claimant's AWW for her period of temporary disability commencing November 4, **2008**, is fairly calculated to be $408.38. Insurer shall pay temporary disability benefits commencing November 4, 2007, based on an average weekly wage of $408.38.

CORRECTED ORDER

It is therefore ordered that Claimant's AWW for her period of temporary disability commencing November 4, **2008**, is $408.38. Insurer shall pay temporary disability benefits commencing November 4, **2008**, based on an average weekly wage of $408.38. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

DATED**:** *May 1, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-659-115

ISSUES

¬ Did claimant overcome by clear and convincing evidence the determination of Dr. Homer that her cervical pain and dysfunction are unrelated to her work-related injury?

¬ Did claimant prove by a preponderance of the evidence that her functional impairment represents a loss that is not listed on the schedule of disabilities under §8-42-107(2)?

¬ Did claimant prove by a preponderance of the evidence that she is unable to earn any wages such that she is permanently and totally disabled?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Employer operates a chain of grocery supermarkets, where claimant worked as a checker. Claimant's date of birth is July 14, 1950; her age at the time of hearing was 58 years. Claimant's dominant hand is her left. Claimant smokes cigarettes. Claimant has been diagnosed with osteoporosis.

2. Claimant experienced a gradual onset of right shoulder pain, which she associated with her cashiering duties. Employer admitted liability for claimant's occupational disease type injury, assigning September 1, 2004, as the date of injury. Hope Barkhurst, M.D., treated claimant between September of 2002 and August of 2004. Cyril Bohachevsky, M.D., treated claimant from January of 2005 through September of 2007.

3. Dr. Barkhurst referred claimant for an evaluation by Orthopedic Surgeon Doug Bagge, M.D., on October 13, 2004. Dr. Bagge obtained the following history from claimant:

> [Claimant] states that over the past 6 weeks she has had a fair amount of pain in her neck. She woke up one morning and **her husband tried to jostle her out of bed**, as she had overslept, **and she had a significant amount of pain**. The shoulder pain was present before that.

(Emphasis added). This history undermines claimant's allegation that her cashiering duties at employer caused her chronic neck pain. Dr. Bagge also noted that claimant had preexisting thoracic scoliosis, causing her to tilt her head to the side to compensate for the thoracic curve.

4. Over the following year, Dr. Bagge provided claimant conservative treatment, including physical therapy and injections into the subacromial space of her right shoulder. On January 12, 2006, Dr. Bagge performed right shoulder surgery to decompress of the subacromial space. In the operative report, Dr. Bagge wrote:

> This 55-year-old female has had persistent neck and shoulder pain. She has seen **spine surgeon** who **felt that this was not related to her neck and was all shoulder pain**.

(Emphasis added). The operative report further reflects that, while claimant had degenerative changes in her shoulder compromising the subacromial space, she had no evidence of any tearing of the rotator cuff. Claimant's work-related injury did not result in a rotator cuff injury.

5. Following shoulder surgery, claimant continued to complain of neck symptoms. Claimant underwent a magnetic resonance imaging (MRI) of her cervical spine on April 11, 2006, which revealed arthritic changes.

6. Dr. Bohachevsky referred claimant for a psychological evaluation by Ed Cotgageorge, Ph.D., on August 30, 2006. Dr. Cotgageorge assessed claimant's psychological functioning and coping skills to determine whether she would benefit from behavioral pain management. Dr. Cotgageorge observed claimant displaying pain behaviors throughout the evaluation, including muscle bracing, guarding, and sighing. Dr. Cotgageorge noted that claimant tends to see herself as having significant problems with functioning. Dr. Cotgageorge reported:

> [Claimant] also has fear based beliefs that activity can create further harm. She is beginning to limit her activities from fear of additional harm and avoidance of pain.

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> Her Pain Tolerance Index score indicates **she has little pain tolerance** and **even minor discomfort is likely interpreted as significant pain**.

(Emphasis added). Dr. Cotgageorge diagnosed pain disorder and adjustment disorder with anxiety. Dr. Cotgageorge recommended 8 to 12 sessions of pain management psychotherapy. Crediting Dr. Cotgageorge's psychological assessment, the Judge finds unreliable claimant's representations of her pain and ability to function.

7. Dr. Bohachevsky placed claimant at maximum medical improvement (MMI) on September 11, 2007. On September 24, 2007, Dr. Bohachevsky rated claimant's permanent medical impairment. Dr. Bohachevsky reported:

> I have seen [claimant] over the past 2-1/2 years for right-sided neck pain, as well as shoulder pain. She originally hurt herself in August 2004, doing work as a grocery checker. She developed pain in her neck, as well as in her left (sic) shoulder.

Dr. Bohachevsky rated claimant's right shoulder impairment at 13% of the right upper extremity, which he converted to 8% of the whole person. Dr. Bohachevsky determined that claimant had additional impairment of her cervical spine, which he rated at 16% of the whole person, based upon combination of a 4% value for specific impairment with a 12% value for range of motion deficits. Dr. Bohachevsky combined the 8% and 16% whole person ratings into an overall rating of 23% of the whole person.

8. Dr. Bohachevsky also referred claimant for a functional capacity evaluation (FCE), which she underwent on September 20, 2007. While the FCE qualified claimant to perform activity within the light physical demand classification, the Validity Profile indicated invalid results in 2 of 2 categories tested. The Validity Profile section provides the following explanation:

> Validity criteria are built into the entire test to determine whether or not the patient is exerting good effort. This information is utilized to determine whether or not the measured results of the test indicate an expected performance. **If the rating is invalid in over half the criteria, the results would indicate a submaximal or inconsistent effort.**

(Emphasis added).

9. In light of the Validity Profile, the Judge finds the FCE an unreliable predictor of claimant's ability to perform physical activity. In addition, the FCE shows restrictions that are unrelated to claimant's injury, such as, limited ability to bend at the waist, or limitations on sitting or standing. At hearing, claimant displayed fluid range of motion when turning her head from side to side, except that she tended to stiffen her neck when this was pointed out. When weighing the Validity Profile, Dr. Cotgageorge's psychological assessment, and claimant's appearance at hearing, the Judge finds claimant failed to show it more probably true that she reliably represents either her pain or her true physical capacities.

10. In his September 24, 2007, report, Dr. Bohachevsky imposed only restrictions of lifting 13 pounds occasionally, 6 pounds frequently, and 3 pounds constantly. The

Judge finds these restrictions apply only to claimant's use of her right, non-dominant, upper extremity. As found, the other restrictions from the claimant's FCE are unreliable.

11. Employer filed a Final Admission of Liability (FAL) on October 5, 2007, admitting liability for permanent partial disability (PPD) benefits in the aggregate amount of $22,727.56, based upon Dr. Bohachevsky's rating of 23% of the whole person.

12. Claimant requested an independent medical examination (DIME) through the Division of Workers' Compensation. The division appointed David B. Homer, M.D., the DIME physician. Dr. Homer examined claimant on January 14, 2008, and agreed with Dr. Bohachevsky's determination that she reached MMI on September 11, 2007. Dr. Homer determined that claimant sustained a repetitive motion type injury to her right shoulder from the activity of checking and lifting items out of the carts.

13. Dr. Homer however determined that claimant's neck complaints are unrelated to her work activities at employer; he wrote:

> What is of most importance in this particular case is that I do not believe that her neck and C-spine complaint are work related whatsoever. Although [claimant] has persistent complaints of neck pain, nothing in her workup and evaluation reveals any objective pathology.
>
> ****
>
> Also, we must try to relate the initial injury to any subsequent pathology. Certainly, the repetitive motions she used as a checker was the cause of her shoulder pathology. However, **I find it hard to envision that such repetitive motions could conceivably cause any significant injury to the C-spine. Therefore, my opinion is that [claimant's] whole impairment in totality be limited to her shoulder.**

(Emphasis added). Dr. Homer testified that the pathology from claimant's injury is located solely in her right shoulder, and not in her neck; he stated:

> [I]n my medical opinion, I don't think that there was a repetitive mechanism or trauma that caused her neck pain. **She definitely has arthritis in her neck, but I don't think you can pin that on the repetitive upper extremity motion.**

(Emphasis added).

14. Dr. Homer thus rated claimant's permanent impairment, based upon right shoulder impairment, at 20% of the right upper extremity, which he converted to 12% of the whole person. Dr. Homer's determination of causation and whole person impairment rating is presumptively correct unless overcome by clear and convincing evidence.

15. On January 31, 2008, employer filed another FAL, admitting liability for PPD benefits in the aggregate amount of $3,885.02, based upon Dr. Homer's rating of 20% of the right upper extremity. This FAL reflects that employer has paid some $16,333.05 in medical benefits and some $37,272.44 in temporary total disability benefits over some 87 weeks.

16. Claimant failed to show it highly probable Dr. Homer erred in determining that her cashiering activity at employer did not cause any injury or pathology in her cervical spine. The pathology in claimant's neck essentially represents arthritic changes. Although Dr. Bohachevsky included a rating for cervical spine impairment in his overall rating of claimant's impairment, he failed to persuasively explain the basis for determining that claimant's cervical pathology was causally related to her cashiering duties at employer. By contrast, Dr. Homer fully explained the basis for his opinion that claimant's cervical spine pathology and impairment are unrelated to her activities at employer. In arriving at his opinion, Dr. Homer weighed the information contained in claimant's medical records. As found, the history of neck pain claimant reported to Dr. Bagge in October of 2004 undermines her allegation that her cashiering duties at employer caused her chronic neck pain. That history instead supports the medical opinion of Dr. Homer. The difference of opinion between Dr. Bohachevsky and Dr. Homer fails to show it highly probable that Dr. Homer's opinion is incorrect.

17. Claimant showed it more probably true than not that the situs of the functional impairment from her right shoulder injury involves a loss not enumerated on the schedule of impairments under §8-42-107(2). The schedule of specific injuries includes, in §8-42-107(2)(a), the loss of the arm at the shoulder; however, impairment of the shoulder is not listed in the schedule of disabilities. The situs of claimant's surgery involved acromioplasty -- shaving the bony structure above the glenohumeral joint, *i.e.*, above the arm measured at the shoulder. The situs of claimant's injury thus involved pathology above the arm measured at the shoulder. Crediting the testimony of Dr. Homer, claimant's shoulder injury causes referred pain in the upper back, scalene, and trepezius musculature, which are above the arm measured at the shoulder. This testimony is amply supported by claimant's testimony that she suffers from neck and upper back pain. Pain in those regions causes functional impairment. Thus, the situs of the functional impairment or loss from claimant's injury involves areas of claimant's body above the arm measured at the shoulder. Claimant's loss involves areas not enumerated on the schedule of disabilities.

18. At claimant's request, David W. Zierk, PsyD, QRC, performed a vocational assessment of her residual capacity to earn wages in the same or other employment. Dr. Zierk opined:

> [T]he combination of … medical and non-medical factors combine to yield an insufficient work performance profile that directly precludes [claimant's] capacity to resume competitive employment. [I]t is concluded [claimant] **remains incapable of becoming employed and earning wages in her local labor market** as a direct result of her September 01, 2004 industrial injury.

(Emphasis added). Although Cortez, Colorado, is claimant's local labor market, there was no persuasive evidence showing that claimant's commutable labor market should not include Durango, Colorado, which is only a 45 to 50 minute drive from Cortez. The Judge finds claimant's commutable labor market includes the Cortez and Durango areas.

19. At employer's request, Torrey Kay Beil, CDMS, QRC, performed a vocational assessment of claimant's residual capacity to earn wages in the same or other employment. Crediting Ms. Beil's report, claimant has past work experience as a checker/cashier, bookkeeper, courtesy clerk, salad bar preparer, and gas station checker. Like Dr. Zierk, Ms. Beil determined that claimant could not return to work as a grocery checker because of the physical demands of lifting items such as cat litter, dog food, and cases of soda. Ms. Beil nonetheless determined that claimant's residual physical capacity allows her to work in positions of cashier, courtesy booth cashier, bookkeeping (with training to update her skills), and motel/hotel desk clerk.

20. Crediting the medical opinion of Dr. Homer, claimant's injury involves only her right shoulder. Claimant acknowledged that she retains normal functioning of her left upper extremity, which is her dominant extremity. Claimant has not worked for anyone since January of 2006. Claimant receives monthly disability insurance benefits in the amount of $1089.00 from the Social Security Administration. Claimant is not a high school graduate, but she obtained her GED. Claimant acknowledged that, while she learned home exercises during physical therapy, she does not perform any of the exercises.

21. Although claimant testified she can only stand 35 to 40 minutes and can only sit 30 to 40 minutes at a time, there was no persuasive medical evidence showing these subjective restrictions are either reasonable or related to claimant's right shoulder injury. While claimant stated she limits her driving, there was no persuasive medical evidence otherwise showing this subjective restriction is either reasonable or related to claimant's right shoulder injury. As found above, claimant unreliably represents her level of pain and physical ability to function. In light of this, there is no reasonably reliable physical activity restriction, other than Dr. Bohachevsky's right upper extremity lifting restrictions of 13 pounds occasionally, 6 pounds frequently, and 3 pounds constantly.

22. Claimant applied for a number of jobs identified by Ms. Beil in her labor market analysis. Claimant attached copies of the FCE to job applications she submitted to Holiday Inn, Budget Host Inn, Best Western, and other potential employers. In light of the Judge's finding that the FCE is unreliable, claimant likely misrepresented her residual physical abilities by attaching the FCE to her job applications. The results of claimant's job search are unpersuasive.

23. Dr. Zierk relies on claimant's cervical complaints, fatigue, and use of Lortab medication as primary factors supporting his opinion that claimant is unable to earn any wages. Dr. Zierk's opinion is unpersuasive for the following reasons: There is no persuasive evidence in the medical records showing that claimant suffers from fatigue. Claimant's cervical functionality is unrelated to her work injury. Dr. Zierk considered work restrictions allegedly related to claimant's lumbar spine function, restrictions which are unsupported by credible medical evidence, and which are unrelated to claimant's work injury. Dr. Zierk performed no transferable skills analysis or labor market studies. Dr. Zierk was mistaken in stating claimant medicates her pain with Lortab. While Dr. Zierk characterizes claimant's right upper extremity injury as catastrophic, the Judge found claimant's right shoulder surgery was necessary to address degenerative changes, and not to address a torn rotator cuff. In addition, claimant's right shoulder injury involves her non-dominant extremity.

24. Claimant failed to show it more probably true than not that she is unable to earn wages in other employment. As found, claimant's right shoulder injury resulted in right upper extremity lifting restrictions of 13 pounds occasionally, 6 pounds frequently, and 3 pounds constantly. The Judge found no other persuasive restrictions either related to claimant's right upper extremity injury or related to another medical condition. There is no persuasive evidence showing claimant physically incapable of performing the positions identified by Ms. Beil as available within claimant's commutable labor market.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, *supra*. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

A. Overcoming Dr. Homer's opinion:

Claimant argues she has overcome by clear and convincing evidence the determination of Dr. Homer that her cervical pathology, pain, and dysfunction are unrelated to her work-related injury. The Judge disagrees.

Sections 8-42-107(8)(b)(III) and (c), *supra*, provide that the determination of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App.

1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indust. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. Industrial Claim Appeals Office*, *supra.*

Here, the Judge found claimant failed to show it highly probable that Dr. Homer was incorrect in determining that claimant's repetitive motion activity at employer failed to cause any injury or pathology in claimant's cervical spine. Claimant thus failed to overcome Dr. Homer's determination by clear and convincing evidence.

As found, Dr. Bohachevsky included a rating for cervical spine impairment in his overall rating of claimant's impairment, but he failed to persuasively explain the basis for determining that claimant's cervical pathology was causally related to her cashiering duties at employer. By contrast, Dr. Homer fully explained the basis for his opinion that claimant's cervical spine pathology and impairment are unrelated to her injury at employer. In arriving at his opinion, Dr. Homer weighed the information contained in claimant's medical records. Indeed, the history of neck pain claimant reported to Dr. Bagge in October of 2004 undermines her allegation that her cashiering duties at employer caused her chronic neck pain. That history instead supports the medical opinion of Dr. Homer. The difference of opinion between Dr. Bohachevsky and Dr. Homer fails to show it highly probable that Dr. Homer's opinion is incorrect.

The Judge concludes claimant's request for PPD benefits based upon impairment of her cervical spine should be denied and dismissed.

B. Situs of the Functional Impairment:

Claimant argues she has proven by a preponderance of the evidence that her PPD benefits should be based upon impairment of the whole person because her functional impairment represents a loss that is not one enumerated on the schedule of disabilities under §8-42-107(2). The Judge agrees.

The term "injury" refers to the part of the body that has sustained the ultimate loss. *Mountain City Meat Co. v. Oqueda,* 919 P.2d 246 (Colo. 1996). In the context of §8-42-107(1), the term "injury" refers to the part or parts of the body that have been functionally impaired or disabled as a result of the injury. *Maree v. Jefferson County Sheriff's Department*, W.C. No. 4-260-536 (ICAO August 6, 1998), citing *Strauch v. PSL*

Swedish Healthcare, 917 P.2d 366 (Colo. App. 1996). Section 8-42-107(1)(a), C.R.S. (2003), limits medical impairment benefits to those provided in subsection (2) where the claimant's injury is one enumerated on the schedule. The schedule of specific injuries includes, in §8-42-107(2)(a), the loss of the arm at the shoulder; however, impairment of the shoulder is not listed in the schedule of disabilities. *Maree v. Jefferson County Sheriff's Department*, *supra*. Although §8-42-107(2)(a) does not describe a shoulder injury, our courts have construed that the dispositive issue is whether the claimant sustained a functional impairment to the portion of the body that is listed on the schedule of disabilities. *See Strauch v. PSL Swedish Healthcare*, *supra*. Thus, the ALJ is constrained to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Id.* Pain and discomfort which limit the claimant's use of a portion of his body may be considered functional impairment. *Beck v. Mile Hi Express, Inc.*, W.C. No. 4-283-483 (ICAO February 11, 1997). Section 8-42-107(1)(b), *supra*, provides that, where claimant sustains an injury not enumerated on the schedule, his permanent medical impairment shall be compensated based upon the whole person.

The Judge found claimant showed it more probably true than not that the situs of the functional impairment from her right shoulder injury involves a loss not enumerated on the schedule of impairments under §8-42-107(2). Claimant thus proved by a preponderance of the evidence that her PPD benefits should be based upon impairment of the whole person.

As found, the schedule of specific injuries includes, at §8-42-107(2)(a), the loss of the arm at the shoulder; however, impairment of the shoulder is not listed in the schedule of disabilities. The Judge notes that the situs of claimant's surgery involved acromioplasty -- shaving the bony structure above the glenohumeral joint, *i.e*., above the arm measured at the shoulder. The situs of claimant's injury thus involved pathology above the arm measured at the shoulder. Crediting the testimony of Dr. Homer, claimant's shoulder injury causes referred pain in the upper back, scalene, and trepezius musculature, which are areas on claimant's trunk, above the arm measured at the shoulder. Dr. Homer's testimony is amply supported by claimant's testimony that she suffers from neck and upper back pain. Pain in those regions causes functional impairment. Thus, the situs of the functional impairment or loss from claimant's injury involves areas of claimant's body above the arm measured at the shoulder. Claimant's loss involves areas not enumerated on the schedule of disabilities.

The Judge concludes employer should pay claimant PPD benefits based upon Dr. Homer's rating of 12% of the whole person.

C. Permanent Total Disability Benefits:

Claimant argues she has proven by a preponderance of the evidence that she is unable to earn any wages such that she is permanently and totally disabled. The Judge disagrees.

To prove her claim that she is permanently and totally disabled, claimant shoulders the burden of proving by a preponderance of the evidence that she is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The critical test is whether employment exists that is reasonably available to claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*.

The Judge found that claimant failed to show it more probably true than not that she is unable to earn wages in other employment. Claimant thus failed to prove by a preponderance of the evidence that she is permanently and totally disabled.

As found, claimant's right shoulder injury resulted in right upper extremity lifting restrictions of 13 pounds occasionally, 6 pounds frequently, and 3 pounds constantly. The Judge found no other persuasive restrictions either related to claimant's right upper extremity injury or related to another medical condition. There is no persuasive evidence showing claimant physically incapable of performing the positions identified by Ms. Beil as available to claimant within her commutable labor market.

The Judge concludes claimant's claim for permanent total disability benefits should be denied and dismissed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for PPD benefits based upon impairment of her cervical spine is denied and dismissed.

2. Employer shall pay claimant PPD benefits based upon Dr. Homer's rating of 12% of the whole person.

3. Claimant's claim for permanent total disability benefits is denied and dismissed.

4. Employer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

5. Issues not expressly decided herein are reserved to the parties for future determination.

DATED: _May 1, 2009_

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-736-727

ISSUES

1. The issues for determination are compensability, medical benefits, average weekly wage ("AWW"), temporary total disability ("TTD"), temporary partial disability benefits ("TPD") and permanent partial disability benefits ("PPD").

2. The parties stipulated prior to the hearing that if the claim is found compensable, the average weekly wage would be $447.71.

3. The parties further stipulated that Claimant's alleged periods of temporary disability benefits include temporary partial disability from October 5, 2007 through November 27, 2007, temporary total disability from November 28, 2007 through January 21, 2008, temporary partial disability benefits from January 22, 2008 though January 31, 2008, and temporary total disability benefits from February 1, 2008 through July 2, 2008. All temporary disability benefits are subject to any statutory offset for employer for unemployment benefits received by Claimant.

4. The parties stipulated that Claimant would be at MMI as of July 3, 2008 with a permanent impairment rating of 5% of the upper extremity. If the claim is compensable, and Claimant is successful in converting the impairment rating to a whole person award, the 5% upper extremity impairment rating converts to a 3% whole person award.

5. The parties stipulated that the issues of MMI and PPD are ripe for determination as Claimant has stipulated that she will not be entitled to a Division Independent Medical Examination by proceeding to hearing on these issues.

6. Lastly, the parties stipulated that Insurer 1 provided coverage for employer from January 30, 2006 through December 31, 2006 and Insurer 2 provided coverage from January 1, 2007 thought the end of Claimant's employment on January 31, 2008.

FINDINGS OF FACT

1. Claimant was employed on the assembly line for employer beginning in November, 2005. Claimant's job duties including cutting webbing and assembly sewing. Claimant would need to reach above her head and pull boxes containing the webbing off a shelf to obtain the webbing. Claimant would pull straps and, occasionally, the

straps would get stuck. Claimant testified that she experienced pain with both of these activities. Claimant alleges an injury to her right shoulder with a date of onset of November 28, 2006 as a result of repetitive activities at work.

2. Claimant first sought treatment through a therapist, Mr. Leighton, provided by employer. Mr. Leighton recommended Claimant follow up with a physician, and Claimant was referred to Dr. Funk. Dr. Funk first examined Claimant on December 1, 2006. Claimant reported an insidious onset of pain associated with overhead and forward reaching activities. Claimant reported taking ibuprofen for the shoulder discomfort. On physical exam, Dr. Funk noted Claimant had a positive Hawkins sign and mildly positive impingement sign. Dr. Funk offered Claimant a shoulder injection, which Claimant accepted. Claimant returned to Dr. Funk on December 11, 2006 reporting that her shoulder discomfort had improved dramatically following the injection. Dr. Funk recommended Claimant continue working with restrictions on her overhead activities and recommended follow up in four weeks. Claimant testified that her employer provided modified work within those restrictions that limited her overhead activity and restricted her from having to perform the web cutting activity that aggravated her shoulder symptoms. The ALJ finds Claimant's testimony credible.

3. Claimant did not seek treatment for her shoulder again until being re-evaluated by the employer's therapist, Mr. Leighton on June 5, 2007. Mr. Leighton again referred Claimant for medical treatment and Claimant reported her complaints to her supervisor, Ms. Hart. Claimant returned to Dr. Funk on June 11, 2007 with complaints of right shoulder pain with a gradual onset four weeks ago that got worse over the last two weeks. Claimant reported to Dr. Funk that web cutting seemed to be the primary job that was bothering her. Dr. Funk noted that Claimant had positive impingement sign and a positive Hawkins sign. Dr. Funk opined that Claimant had a recurrent subacromial bursitis with suspected rotator cuff arthropathy and biceps tendonitis.

4. Claimant was referred by Dr. Funk to Dr. Huene for treatment on June 28, 2007. Claimant reported to Dr. Huene that she had sought treatment through anti-inflammatories, physical therapy and injections without help. Dr. Huene suspected Claimant may have an impingement syndrome and/or acromioclavicular arthritis. Dr. Huene provided Claimant with Celebrex and recommended magnetic resonance imaging ("MRI") of the shoulder. The MRI was performed on July 13, 2007 and revealed: (1) tedinosis of the supraspinatus tendon; (2) small amount of fluid in the subacromial/ subdeltoid bursa, question physiologic fluid or bursitits; (3) No full thickness rotator cuff tear demonstrated.

5. Claimant underwent a second injection of the right shoulder on July 26, 2007 under the auspices of Dr. Huene. Claimant again reported good relief with the injection when she was examined by Dr. Huene on August 23, 2007. Claimant returned to Dr. Huene on September 20, 2007 with reports of right shoulder pain returning after the injection had worn off. Dr. Huene diagnosed the Claimant as having shoulder pain with suspected impingement syndrome and acromioclavicular arthritis. Dr. Huene reviewed Claimant's treatment options and noted that Claimant wished to pursue arthro-

scopic surgery. Claimant returned to Dr. Huene on October 5, 2007 with continued complaints of right shoulder pain. Dr. Huene again reviewed Claimant's treatment options, and because of "insurance problems", Claimant elected to have another injection to her right shoulder. Claimant was placed on light duty by Dr. Huene with reduced hours of only five (5) per day.

6. Claimant returned to Dr. Huene on October 25, 2007 and reported that while she still had shoulder pain, she wanted to go back to work as tolerated. Dr. Huene modified Claimant's restrictions to include working up to a regular shift. Claimant was again evaluated by Dr. Huene on November 1, 2007 and reported continuing to experience right shoulder pain. Dr. Huene again discussed surgical options with Claimant, and Claimant agreed to undergo an arthroscopic procedure. Claimant eventually underwent right shoulder surgery under the auspices of Dr. Huene on December 13, 2007. Dr. Huene noted in his operative report that the anterior labrum had a slight tear to it, but it was extremely unusual. It almost appeared to be a Bankart lesion initially. Due to the unusual tear, Dr. Huene determined the tear was probably a congenital problem and he elected to leave it alone. Dr. Huene performed a right shoulder arthroscopy with debridement of the anterior labrum, open acomioplasty with coracoacromial ligament resection, distal clavicle excision and rotator cuff repair. Claimant's recovery from the surgery was unremarkable, and Claimant was eventually placed at maximum medical improvement ("MMI") by Dr. Huene on July 3, 2008.

7. After being placed at MMI by Dr. Huene, Claimant was referred to Dr. Price for an impairment rating. Dr. Price evaluated Claimant on August 7, 2008. Claimant reported to Dr. Price that her injury did not happen on a specific date, but occurred over time while she was pulling and pushing on straps through a sandal. Dr. Price opined that Claimant was at MMI and provided Claimant with a permanent impairment rating of 5% of the upper extremity. Dr. Price recommended that Claimant follow up with her primary care physician periodically if needed and noted Claimant may need periodic corticosteroid injections, no more than 3 a year, if she has a flare up. Dr. Price also recommended non-steroidal anti-inflammatories.

8. Claimant was referred for an independent medical examination by Insurer 2 with Dr. Paz on May 2, 2008. Dr. Paz obtained a detailed history from Claimant with regard to her work duties including Claimant's duties at each job station. Claimant reported to Dr. Paz that she began to develop pain in her shoulder sometime in November, 2006. Claimant reported that her pain in her right shoulder was "sharp" and would increase with activity, particularly working at above chest height or reaching in front of her. Claimant complained to Dr. Paz of pain in her right shoulder and reported that while she was occasionally pain free, her symptoms would recur with any activity. Dr. Paz opined that Claimant's right shoulder injury was not related to her employment with employer.

9. Respondents presented the testimony of Ms. Hart, Claimant's supervisor. Ms. Hart testified that Claimant reported a work injury to her involving Claimant's right shoulder on November 28, 2006. Claimant was referred to a physician and employer

modified Claimant's job duties in December 2006 in response to recommendations from Dr. Funk. Claimant's modified job duties included no work at the web cutting station and no work at the heel riser station. Claimant did not report any additional problems with her right shoulder until June 5, 2007. Ms. Hart continued Claimant on her modified work after December 2006. Ms. Hart evaluated Claimant's job performance on July 30, 2007 and marked Claimant down for poor attendance. Ms. Hart indicated that claimant's average attendance from December 2006 to June 2007 was 90.64% that placed claimant in the "marginal, needs improvement" category. Claimant's overall ranking for the performance review was on the high end of "Very Good". Claimant was warned about her attendance problems again on October 2, 2007 and she was encouraged to raise her attendance to 92%. Claimant was warned that if her attendance fell below the 92% mark it could affect her employment with employer. The ALJ finds the testimony of Ms. Hart to be credible.

10. Claimant was eventually placed on FMLA on November 28, 2007. According to the employer's records, Claimant was placed on FMLA because she was not able to perform the essential functions of her job, requiring the employer to cover and adapt the entire sewing team to Claimant's shoulder injury. Claimant obtained the shoulder surgery while on FMLA leave and returned to her employer on January 22, 2008. Claimant was terminated from her employment on January 31, 2008 as a result of her attendance issues. The ALJ credits the November 27, 2007 e-mail from the employer prior to Claimant being placed on FMLA leave and finds that at least some of Claimant's attendance issues were related to her right shoulder condition. The ALJ finds that the attendance issues related to Claimant's shoulder condition do not represent a volitional act on the part of Claimant.

11. Claimant had three instances over the past 8 years in which she was treated at Delta County Memorial Hospital Emergency Room ("ER") due to alcohol related issues. Claimant's most relevant incident involved an incident on the night of June 12, 2007 when she was admitted after ingesting unknown drugs. Claimant was combative in the ER and required 8 people to hold her down until she was intubated. Claimant's toxicology screen was positive for elevated levels of alcohol and marijuana.

12. Dr. Paz noted in his report and testified at hearing that it was medically probably that Claimant's right shoulder injury that required surgery was caused by the incident in the ER on June 12, 2007 in which 8 people were needed to restrain Claimant. Dr. Paz testified at hearing that Claimant suffers from a Type II acromion, which is congenital in nature, and when combined with Claimant's age related arthritis in the ligaments of her shoulder, the shoulder space decreased to create an impingement syndrome. Dr. Paz further noted that, based upon the operative report of Dr. Huene, Claimant's labrum did not solidly seat in Claimant's right shoulder joint, allowing Claimant's humerous to move in a fashion which narrows Claimant's joint space further.

13. Claimant argues that she has proven by a preponderance of the evidence that she suffered an occupational disease arising out of her employment on November 28, 2006. The ALJ agrees. The ALJ finds the testimony of Claimant that she suffered

an occupational disease as a result of her work activities with a date of injury of November 28, 2006 credible. While Claimant may have had a type II acromion prior to her exposure at work, Claimant's testimony that her shoulder pain was aggravated with overhead work is consistent in the medical reports and is found to be credible. The ALJ finds that Claimant's job duties, including her overhead work, aggravated her preexisting type II acromion and other congenital deformities of Claimant's shoulder. The ALJ finds that any preexisting congenital deformities were asymptomatic prior to Claimant's occupational exposure. The ALJ finds that Claimant has proven by a preponderance of the evidence that she suffered an occupational disease with a date of onset of November 28, 2006.

14. Respondents argue that the Claimant suffered an intervening accident while being restrained in the emergency room on June 12 and 13, 2007. The ALJ is not persuaded. The ALJ finds that Respondents have failed to prove that the incident in the ER on June 12, 2007 represents an intervening accident severing Respondents liability for Claimant's right shoulder injury. While the medical records note that 8 people were required to restrain Claimant in the ER on June 12, 2007, the ALJ notes that Claimant was evaluated by Dr. Funk on June 11, 2007, immediately prior to the June 12 incident, and reported complaints of right shoulder pain. Claimant's physical complaints to Dr. Huene when Claimant was evaluated on June 28, 2007 were markedly similar to the complaints Claimant expressed to Dr. Funk on June 11, 2007. Claimant did not complain to the ER physicians of any increase in shoulder pain during the June 12, 2007 incident, and the ALJ finds insufficient evidence to constitute this incident as an intervening accident sufficient to sever the causal connection of Claimant's shoulder injury to her work duties.

15. Claimant argues that she has suffered a permanent impairment rating not contained on the schedule set forth at Section 8-42-107(2). The ALJ is not persuaded. The ALJ finds that Claimant's permanent impairment rating provided by Dr. Price was based on Claimant's loss of range of motion at the shoulder. There was no persuasive evidence that the situs of Claimant's impairment was located off the scheduled impairment set forth at Section 8-42-107(2), C.R.S. The ALJ thus finds that Claimants permanent impairment is limited to a scheduled impairment rating as set forth at Section 8-42-107(2) C.R.S. Claimant has failed to prove by a preponderance of the evidence that Claimant's impairment rating is not contained on the schedule. Claimant has failed to prove by a preponderance of the evidence that she is entitled to a whole person impairment rating as set forth at Section 8-42-107(8), C.R.S.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering

all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Claimant must show that the injury was sustained in the course and scope of his employment and that the injury arose out of her employment. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 579. A work-related injury is compensable if it "aggravates, accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* Whether there is a sufficient "nexus" or relationship between the Claimant's employment and his injury is one of fact for resolution by the ALJ based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988). The question of whether a claimant has proven that a particular disease, or aggravation of a particular disease, was caused by a work-related hazard is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

4. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a haz-

ard to which the worker would have been equally exposed outside of the employment.

5. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992). Onset of disability is defined as the time when claimant's occupational disease either impairs her ability to effectively and properly perform her regular employment or renders her incapable of returning to work except in a restricted capacity. *See Ortiz v. Murphy*, 964 P.2d 595 (Colo. App. 1998).

6. As found, the ALJ credited the testimony of the Claimant in finding that she suffered an onset of pain resulting in her seeking medical treatment with Dr. Funk as of November 26, 2006. As found, Claimant's work duties aggravated her preexisting type II acromion resulting in occupational disease with an onset of disability of November 28, 2006. As found, Claimant has sustained her burden of proving by a preponderance of the evidence that she suffered an occupational disease with a date of onset of November 28, 2006.

7. Where compensation is payable for an occupational disease, and the claimant was employed by more than one employer, Section 8-41-304(1), C.R.S. assigns responsibility for disability benefits to the employer where the claimant ws "last injuriously exposed to the hazards of such disease and suffered a substantial permanent aggravation thereof." *Ortiz v. Charles J. Murphy & Company*, 964 P.2d 595 (Colo. App. 1998). The "last injurious exposure" test and the "substantial permanent aggravation" test impose separate prerequisites to liability. An injurious exposure occurs when the claimant is exposed to the hazards of the disease in a concentration that would be sufficient to cause the disease in the event of prolonged exposure, without regard to the length of the actual employment. The "substantial permanent aggravation" test mitigates the last injurious exposure rule by focusing on the "effect" of the exposure and requiring that it substantially and permanently aggravate the condition. *Monfort, Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993).

8. Insurer #1 argues that Claimant was last injuriously exposed to the hazards of her employment and suffered a substantial permanent aggravation of her right shoulder condition while employer was insured by Insurer #2. The ALJ is not per-

suaded. The ALJ credits the medical reports of Dr. Funk that note a positive Hawkins sign when Claimant was evaluated in December 2006, along with the reports that Claimant's condition improved dramatically following her injection. The ALJ credits the testimony of Ms. Hart that Claimant's job duties were modified after December 2006 to include no overhead work including taking Claimant off of the web cutting station and the heel riser station. Claimant's complaints to Dr. Funk in June 2007 were markedly similar to complaints Claimant presented to Dr. Funk in December 2006. As found, Claimant's continued employment with employer with restrictions did not result in Claimant suffering a substantial permanent aggravation of her right shoulder condition. As found, Claimant's continued receipt of medical treatment in June 2007 was proximately related to her November 28, 2006 occupational disease.

9. Under Section 8-42-101(1)(a), C.R.S. Respondents are liable for medical treatment that "may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury." That includes furnishing treatment for conditions due to a natural development of the industrial injury. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002). In contrast, no liability exists when a later accident occurs as the direct result of an intervening cause. *Post Printing and Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). However, the intervening event does not sever the causal connection between the injury and the claimant's condition unless the claimant's disability is triggered by the intervening event. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

10. As found, the incident of June 12, 2007 fails to demonstrate an intervening accident sufficient to sever the causal connection of Claimant's occupational disease. Claimant was complaining of similar complaints in her right shoulder to Dr. Funk immediately prior to the June 12, 2007 incident as she complained of on her next medical appointment with Dr. Huene. Additionally, the ALJ found no persuasive evidence that the incident of June 12, 2007 could have sufficiently aggravated Claimant's right shoulder injury other than the testimony of Dr. Paz. Insofar as Dr. Paz testified that the incident represents an intervening event to sever the causal relationship between Claimant's occupational disease of November 28, 2006 and her ongoing medical treatment, the ALJ rejected this testimony.

11. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending phy-

sician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

12. As found, Claimant has proven by a preponderance of the evidence that her right shoulder discomfort led to work restrictions as of October 5, 2007 consisting of limitations of five (5) hour work shifts. Claimant has therefore proven by a preponderance of the evidence that she is entitled to temporary partial disability benefits from October 5, 2007 through November 27, 2007. Claimant was placed on FMLA as of November 28, 2007. According the employer's records, Claimant was placed on FMLA due to the inability of the Claimant to perform the essential functions of her job based on her shoulder injury. The ALJ thus finds that Claimant has proven an entitlement to TTD benefits from November 28, 2007 until January 21, 2008. Claimant returned to work as of January 22, 2008 without restrictions as to the number of hours that she could work and employer accommodated her restrictions. The ALJ thus finds that Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary partial disability benefits for the period of January 22, 2008 through her termination of January 31, 2008. Claimant was termination on January 31, 2008 for violation of the employer's attendance policy. The ALJ found that some of Claimant's attendance issues were related to her shoulder injury. Claimant continued to have work restrictions from Dr. Huene and was not released to return to work without restrictions until July 3, 2008. As found, Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from February 1, 2008 through July 3, 2008.

13. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

14. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant committed a volitional act which led to her termination of employment. As found, based on the totality of the circumstances, at least some of Claimant's attendance issues were the result of her right shoulder problems. Therefore, Re-

spondents have failed to prove by a preponderance of the evidence that Claimant was responsible for her termination of employment.

15. Section 8-42-107(1), C.R.S. limits the Claimant to a scheduled disability award if the injury results in permanent medical impairment enumerated on the schedule of disabilities in Section 8-42-107(2), C.R.S. *Kolar v. Industrial Claim Appeals Office*, 122 P.3d 1075 (Colo. App. 2005). Where the Claimant suffers functional impairment that is not listed on the schedule, the Claimant is entitled to medical impairment benefits for whole person calculated in accordance with Section 8-42-107(8)(c). In the contact of permanent partial disability the term "injury" refers to the part or parts of the body which have been permanently, functionally impaired as a result of the injury, and not the physical situs of the injury. *Walker v. Jim Fouco Motor Company*, 942 P.2d 1390 (Colo. App. 1997); *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo. App. 1996). The courts have held that damage to the structures of the "shoulders" may or may not reflect a "functional impairment" enumerated on the schedule of disabilities. *See Walker v. Jim Fouco Motor Company, supra., Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996); *Langton v. Rocky Mountain Health Care Corp, supra*. The term "injury," as used in Section 8-42-107(a)-(b), refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Warthen v. Industrial Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System, supra.*

16. As found, Claimant has failed to prove by a preponderance of the evidence that she suffered permanent partial disability off the schedule of impairments set forth at Section 8-42-107(2). As found, Claimant is entitled to PPD benefits based upon a 5% upper extremity impairment rating.

ORDER

It is therefore ordered that:

1. Claimant's AWW is $447.71.

2. Insurer 1 shall pay Claimant TPD benefits for the period of October 5, 2007 through November 27, 2007. Insurer 1 shall pay Claimant TTD benefits for the periods of November 28, 2007 through January 21, 2008 and from February 1, 2008 through July 3, 2008.

3. Insurer 1 shall pay Claimant PPD benefits of 5% of the upper extremity.

4. Insurer 1 shall pay for reasonable, necessary and related medical treatment to Claimant's right shoulder provided by authorized physicians and their referrals necessary to cure and relieve the Claimant from the effects of the occupational disease pursuant to the medical fee schedule.

5. Respondents are entitled to an offset for any unemployment benefits Claimant received.

The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

DATED:

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-717-498

ISSUES

1.The issue for determination is whether Claimant has sustained his burden of proving by a preponderance of the evidence that he is permanently totally disabled.

FINDINGS OF FACT

1. Claimant was employed with employer on October 26, 2006 when he assisted a co-worker in helping put gravel in a trench. While in the trench, a concrete wall started to submerge and fell on Claimant's back, striking Claimant's low back and hips.

2. Claimant was taken to St. Mary's Hospital Emergency Room ("ER") on the date of the injury and reported to the ER doctors that he was mainly trapped on his left side with some compression against his right rib cage and right upper extremities. Claimant underwent a CT scan that revealed an iliac fracture on his left side. Claimant was admitted overnight for observation before being mobilized. Claimant underwent post-mobilization x-rays that did not reveal any signs of movement through the fracture site itself. Claimant was referred for physical therapy and discharged home on or about October 28, 2006.

3. Claimant was referred for treatment with Dr. Deering after his discharge from the ER. Dr. Deering evaluated Claimant on November 7, 2006 at which time Claimant reported complaints of right-sided rib pain. Dr. Deering also noted that x-rays, when compared to those taken at the ER, did not reveal any sign of movement of his fracture. Claimant was referred for physical therapy on January 19, 2007 with complaints of buttock pain that wrapped around anteriorly into his groin with numbness into his anterior thigh on occasion. Claimant also reported significant pain since the date of the injury in his posterior left pelvis and left low back. Claimant's therapist recommended Claimant be seen approximately 2 times per week progressing with a work hardening program as tolerated in preparation for return to work.

4. Claimant returned to Dr. Deering on February 9, 2007. Dr. Deering noted that Claimant had been attending physical therapy for about a month and he had been able to lift 25 to 35 pounds without any difficulty. Dr. Deering noted that she would release Claimant for work with restrictions of lifting up to 50 pounds for weeks 1 and 2, up to 75 pounds for weeks 3 and 4 and normal lifting after week 4. Claimant also had additional restrictions on climbing, no greater than 8 feet for weeks 1 and 2, climbing without weight for weeks 3 and 4, and climbing with 25 pounds after week 4. Dr. Deering contemplated that Claimant could be released to return to work without restrictions in six weeks time.

5. Claimant returned to Dr. Deering on March 23, 2007 for reevaluation. Dr. Deering reviewed Claimant's physical therapy records and noted that Claimant's compliance was very good, and they had progressed into work hardening. Claimant reported to Dr. Deering that he had returned to work, but his employer was unhappy with the fact that he was moving slowly trying to do his activities reported having been fired because of his inability to perform the activities of his job. Dr. Deering noted that Claimant had a devastating injury involving a fracture and soft tissue injury to the area around the fracture and reported that she did not believe Claimant would be full steam until he is at the one-year marker. Claimant reported to Dr. Deering that he was no longer covered for this injury, and would be going to go to social services to see what kind of assistance he can get. Dr. Deering reported that she would be happy to assist Claimant in any way as far as getting the situation rectified because this was definitely a workers' compensation injury and Claimant had not completed treatment. Dr. Deering also provided Claimant with restrictions of no lifting, no bending and no climbing.

6. Claimant returned to Dr. Deering on July 13, 2007 with continued complaints of pain most of the time across his back and into both buttocks. Dr. Deering noted Claimant had a positive straight leg test on the left at 90 degrees. Dr. Deering obtained x-rays that were negative, and recommended obtaining an MRI of the lumbar spine. Claimant underwent the MRI on July 27, 2007 that revealed a very small bulge at the L5-S1 level. Dr. Deering opined that Claimant's bulge would not be responsible for Claimant's subjective problems. Dr. Deering suggested performing a repeat CT to determine if there is some bony anomaly from the fracture that would cause Claimant's reported problems and further noted that it was difficult to fully ascertain what the exact nature of Claimant's pain, paresthesias and groin pain were from. The CT scan was performed on August 24, 2007 and included Claimant's low back and pelvis. The CT scan revealed some new degenerative joint disease in Claimant's left sacroiliac joint and a healed fracture of the pelvis.

7. Claimant was evaluated by Dr. Frazho on August 30, 2007 and presented with continued complaints of pain in his low back. Dr. Frazho encouraged Claimant to work on core stabilization and, based on Claimant not improving with physical therapy, recommended an L5-S1 transforaminal epidural injection. Claimant returned to Dr. Frazho and reported no relief with the lumbar epidural. Dr. Frazho concluded Claimant's pain was myofascial in nature and did not recommend any further interventional options.

8. Claimant was eventually referred to Dr. Weaver for an impairment rating on January 9, 2008. Based upon questions from a representative of insurer, Dr. Weaver indicated that there was not a good medical or orthopaedic explanation for Claimant's change in his work ability after his injury. Dr. Weaver noted that a pelvic fracture typically heals in six to eight weeks without any residual symptoms. Based upon the lack of objective findings in Claimant's presentation, Dr. Weaver opined that Claimant's current complaints were not valid and Claimant was perfectly capable of going back to work. Dr. Weaver further stated that Claimant was at MMI with no permanent impairment.

9. Claimant underwent a Division Independent Medical Examination ("DIME") with Dr. McLaughlin on June 26, 2008. Dr. McLaughlin agreed that Claimant was at MMI as of October 2, 2007. Dr. McLaughlin provided Claimant with a combined 9% whole person impairment for his back and left hip injury. Dr. McLaughlin noted that he agreed with Dr. Deering that there was residual low back pain due to soft tissue injury, and Dr. McLaughlin provided an impairment rating pursuant to Table 53(II)(b) for the low back injury. The ALJ interprets Dr. McLaughlin's DIME report as being silent with regard to work restrictions.

10. Claimant was referred by his attorney to Ms. Riley, a physical therapist, for a functional capacity evaluation ("FCE") on September 10, 2008. The FCE concluded Claimant was limited to a light physical demand ability, defined as lifting 20 pounds on an occasional basis and 10 pounds on a frequent basis, with sitting tolerance limited to 30 minutes to 1 hour. The FCE revealed that Claimant tested on 3 out of 5 Waddell's signs, indicating a positive screen for symptom magnification.

11. Claimant testified at hearing that he can only lift 10-12 pounds and needs to lie down for 20-25 minutes after going for a walk. Claimant testified that he does not believe he could consistently attend employment. On cross-examination, Claimant testified that he has not looked for work since leaving employer's employment. Claimant denied being able to work on cars and did not believe he could help assist working on cars.

12. Claimant obtained a vocational evaluation from Mr. Van Iderstine. Mr. Van Iderstine provided a report based upon his evaluation and testified at hearing. Mr. Van Idersine testified that Claimant is non-English speaking and has only a sixth grade education from Mexico. Mr. Van Iderstine testified that based upon the work restrictions set forth in the FCE, his interview with the Claimant, including Claimant's transferable skills, and his labor market research, he did not believe Claimant was capable for earning wages in the Grand Junction labor market.

13. Respondents obtained a vocational evaluation from Ms. Montoya. Ms. Montoya provided a report based upon her telephone interview with Claimant and testified at hearing. Ms. Montoya opined that if the reports of Dr. Weaver and Dr. Frazho are interpreted to indicate that Claimant has no work restrictions, Claimant is capable of earning a wage in the Grand Junction labor market. Ms. Montoya also testified that if you consider the restrictions set forth by the FCE, Claimant would be capable of earning a wage

is unskilled work categories in the area of food service, housekeeping, light janitorial or light maintenance.

14. Respondents attempted video surveillance of the Claimant on six to nine (6-9) occasions, including March 3, 2009. On March 3, 2009, Respondents investigator, Mr. Queen obtained video of Claimant engaging in various activities while working on a truck. Mr. Queen testified that approximately 3 ½ hours of video was obtained that was condensed into an approximately 18 minute that was entered into evidence. The ALJ notes that the video surveillance shows Claimant lifting, bending, squatting, using a large lever with what appears to be significant effort, and crawling underneath the truck. Claimant testified that the actions depicted on the video demonstrate activities he performed on March 3, 2009 for a friend. Claimant testified that after performing these activities he went home and rested and did not perform any further activities that day. The ALJ finds that the surveillance shows Claimant demonstrating the ability to work on a car, despite Claimant's testimony that he is incapable of performing this function.

15. The ALJ finds the surveillance evidence more persuasive as evidence of Claimant's physical abilities than Claimant's testimony. The ALJ finds Claimant's testimony is not credible. Claimant demonstrated the ability in the surveillance to lift more than 10-12 pounds and appears to be able to easily change positions without evidence of pain. The ALJ finds that Claimant's FCE demonstrated 3 of 5 Waddell's signs, evidencing symptom magnification demonstrating Claimant's attempts to exaggerate the effects his injuries. The ALJ finds that the work restrictions set forth in the FCE are not credible based upon Claimant's demonstrations in the surveillance. The ALJ credits the testimony of Ms. Montoya that Clamant is capable of earning wages in the Grand Junction labor market, even considering Claimant's work restrictions set forth by the FCE as being more credible than the opinions of Mr. Van Iderstine. The ALJ interprets the reports of Drs. Frazho and Weaver to set forth no work restrictions for Claimant. The ALJ notes that while Dr. Deering issued work restrictions on March 23, 2007, these work restrictions were far in excess of what she had provided for work restrictions on March 2, 2007, and were in response to Claimant advising Dr. Deering that he had been terminated from his employment and alleging that his workers' compensation claim was no longer covered. The ALJ does not find persuasive the work restrictions set forth by Dr. Deering on March 23, 2007. Insofar as there is a conflict in the evidence based upon the work restrictions set forth by various providers and the FCE, the ALJ interprets the reports of Drs. Frazho and Weaver as releasing the claimant without restrictions and finds these reports credible.

16. Based upon the Claimant's physical condition, mental ability, age, employment history, education, the availability of work and all of the facts of this case, Claimant has failed to prove that it is more probably true than not that Claimant is unable to earn any wages in his previous employment or other employment.

CONCLUSIONS OF LAW

1. To prove his claim that he is permanently totally disabled, claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Section 8-40-201(16.5)(a) and 8-43-201, C.R.S., *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The facts in a workers' compensation case may not be interpreted liberally in favor of either claimant or re-

spondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

2. The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office*, 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education and availability of work that the claimant could perform. *Weld County School District Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The critical test is whether employment exists that is reasonably available to claimant under her particular circumstances. *Weld County School District Re-12 v. Bymer, supra.*

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and action; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. As found, the Claimant's testimony with regard to his physical restrictions is not credible. The FCE setting forth work restrictions of occasional lifting of up to 20 pounds and occasional bending, stooping and squatting is not credible when compared to the evidence presented in the video surveillance. Moreover, the FCE results are called into question by the positive Waddell's signs evidencing symptom magnification on the part of Claimant. As found, the ALJ does not find the work restrictions set forth by the FCE as credible when compared to the Claimant's presentation on the surveillance.

5. As found, the ALJ finds the testimony of Ms. Montoya that Claimant is capable of earning a wage in the Grand Junction labor market credible. As found, Claimant has failed to show a reasonable effort to attempt to return to employment as evidenced by his testimony that he has not looked for work since leaving his employer in March, 2007. As found, based on Claimant's physical condition, mental ability, age, employment history, education, the availability of work and all of the facts of this case, Claimant has failed to prove it is more probably true than not that there is no employment that is reasonably available to him under his particular circumstances.

ORDER

It is therefore ordered that:

1. Claimant's claim for permanent total disability benefits is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED:

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. **4-723-662, 4-703-202** and 4-665-972

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 2, 2009 and April 27, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 2/2/09, Courtroom 4, beginning at 1:30 PM, and ending at 4:52 PM; and, 4/27/09, Courtroom 3, beginning at 1:30 PM, and ending at 3:30 PM).

W.C. No. **4-723-662** involves a fully contested alleged injury of July 5, 2003, at which time the Employer was insured by Wausau Insurance Company (hereinafter "Wausau"). W.C. No. **4-703-202** involves a fully contested injury of December 16, 1998. Lumbermen"s Underwriting Alliance (hereinafter "Lumbermen's") insured the Employer at the relevant times in 1998. W.C. No. 4-665-972 involves a fully contested injury of October 14, 2005, at which time the Employer was insured by Employers Compensation Insurance Company (hereinafter ("Employers"). At issue in this decision are two cases: W.C. No. 4-723-662 and 4-703-202, wherein Respondents Employer, Wausau and Lumberman's assert the applicability of the statute of limitations.

At the conclusion of the Claimant's case in chief, the ALJ ruled from the bench, granting Wausau's motion to dismiss, based on the statute of limitations contained in Section 8-43-103 (2), C.R.S. (2008). At the conclusion of all the evidence, at the last session of the hearing, the ALJ ruled from the bench, granting Lumbermen's motion to dismiss, based on the statute of limitations. The ALJ referred preparation of proposed decisions to counsel for Wausau and Lumbermen's, to be filed electronically, giving the other parties 3 working days within which to file electronic objections. Both proposed decision were filed on April 28, 2009. No timely objections thereto were filed. The ALJ has modified and combined the proposed decisions and, as modified, hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether Claimant's claim for benefits, arising out of alleged injuries of July 5, 2003 and December 16, 1998, are barred by the statute of limitations; and, Claimant's assertion that the statute of limitations has been tolled because of Employer's failure to file a First Report of Injury with the Division of Workers' Compensation (DOWC) after learning of a "lost time" injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

W.C. No. 4-723-662

1. Wausau extended workers compensation insurance coverage to the employer from January 1, 2003, through December 31, 2003. The claim involving Wausau is W.C. No. 4-723-662.

2. In regard to W.C. No. 4-723-662, the Claimant asserted he hurt his low back on July 5, 2003, while "preparing to attach a trailer to a company truck". Claimant's back popped and he felt considerable pain. There was no persuasive evidence that he informed his Employer about the injury. He went to see his family physician, John W. Volk, M.D., on July 7, 2003. Dr. Volk diagnosed a lumbar strain, recommended ibuprofen and suggested Claimant return in a month. The Claimant did not return to Dr. Volk for another year.

3. An MRI (magnetic resonance imaging) of August 4, 2004, showed "a 2 to 3 mm posterior protrusion" at the L1-L2 level.

4. The Claimant filed a Workers Claim for Compensation, dated May 3, 2007, on May 18, 2007, more than three years after he should have been aware of a work-related injury, and more than two years after he should have been aware of a structural abnormality in his back that was related to the incident of July 5, 2003.

5. The Claimant knew the nature, seriousness and probable compensable character of his injury on July 7, 2003, as of August 4, 2004, when he obtained the recommended MRI (magnetic resonance imaging) that showed "a 2 to 3 mm posterior protrusion" at the L1-L2 level. This was more than two years after the filing of his Workers' Claim for Compensation on May 18, 2007. Therefore, Respondents Employer and Wausau have proven, by a preponderance of the evidence, that Claimant's Workers' Claim for Compensation was filed more than two years after the Claimant knew the nature, seriousness and probable compensable nature of his injury of July 7, 2003.

6. There is no persuasive evidence that the Employer filed a First Report of Injury, but there is also no persuasive evidence that Claimant missed time from work because of the July 5, 2003 incident. Therefore, Claimant has failed to prove, by preponderant evidence, that the statute of limitations was tolled.

W.C. No. 4-703-202

7. Claimant was working on top of an eight-foot concrete wall on December 16, 1998. He caught his pant leg on a piece of re-bar. He tripped, then jumped and landed on his feet on the ground. Claimant reported the incident to the Employer.

8. On December 17, 1998, the Employer completed an Employer's First Report of Injury form. The Employer submitted this form to Lumbermen's. On January 5, 1999, Lumbermen's sent Employer a Claims Acknowledgment letter, confirming receipt of the claim concerning Claimant's injury on December 16, 1998.

9. Claimant was seen at Johnstown Family Physicians on January 16, 1999. Sheryl Ehrman, R.N, prepared a report concerning Claimant on that date and noted, "… He denies having missed any work since the accident including the day of the accident." The ALJ finds Claimant missed no work as a result of the incident on December 16, 1998.

10. Claimant filed a Worker's Claim for Compensation form on October 27, 2006, concerning the incident that occurred on December 16, 1998. Claimant filed this claim over seven years after the date of injury.

11. Claimant missed no time from work after the December 16, 1998 injury. He presented no persuasive evidence establishing any permanent physical impairment, and the injury did not result in a fatality. Accordingly, Employer was only required to report the injury to its insurer, and it did so.

12. Lumbermen's filed a Notice of Contest on February 5, 2007.

13. Respondents Employer and Lumbermen's have proven, by a preponderance of the evidence, that Claimant filed his Workers' Claim for Compensation almost 7 years after the incident of December 16, 1998. Claimant has failed to prove a lost time injury and, therefore, failed to prove a tolling of the statute of limitations. Also, Claimant has failed to prove, by preponderant evidence, a reasonable excuse for not filing a claim within two years.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

W.C. No 4-723-662

a. The statute of limitations, Section 8-43-103(2), C.R.S. (2008), provides:

> The right to compensation provided by said articles shall be barred unless, within two years after the injury or after death resulting therefrom, a notice claiming compensation is filed with the division.

As found, Claimant did not file a Claim for Compensation until May 18, 2007, nearly four years after the date of his injury. This is outside the period specified in Section 8-43-103(2). In *Sanchez v. Western Forge*, 4-428-933 [Industrial Claim Appeals Office (ICAO), May 17, 2001], ICAO described the elements necessary to determine whether a Claim for Compensation was filed in a timely manner.

> Section 8-43-103(2) provides that the right to workers' compensation is barred unless a formal claim is filed within two years of the injury. The statute of limitations does not begin until the claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). (*Sanchez*, pg. 2)

b. The Claimant knew the nature, seriousness and probable compensable character of his injury on July 7, 2003, as of August 4, 2004, when he obtained the recommended MRI (magnetic resonance imaging) that showed "a 2 to 3 mm posterior protrusion" at the L1-L2 level. This was more than two years prior to the filing of his Workers' Claim for Compensation on May 18, 2007. His claim then, is barred by the statute of limitations in Section 8-43-103(2).

W.C. No. 4-703-202

c. Paragraph (a) above is hereby incorporated by reference as if fully restated herein.

d. Section 8-43-103(2), C.R.S. (2008), provides that a three-year statute of limitations may apply if a claimant provides a "reasonable excuse" for the failure to timely file a notice claiming compensation. The same section provides that the statute of limitations may be tolled, "…in all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division as required

by the provisions of said articles…" As found, Claimant had no reasonable excuse for failing to file a claim within two years.

e. Claimant has the burden to prove by a preponderance of the evidence that that the statute of limitations has been tolled. *See City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002) [burden of proof rests upon the party asserting the affirmative of a proposition]. The tolling provisions create an exception to a claimant's duty to file a claim within two years of the date of injury [or three years under the circumstances noted above]. *See Procopio v. Army Navy Surplus*, W.C. No. 4-465-076 (ICAO, June 10, 2005). Claimant argued the statute of limitations was tolled because Employer failed to report the injury to the DOWC. This argument is not well taken because the Employer was not required to report the "no lost time" injury to the DOWC. Section 8-43-101(2), C.R.S., as it existed on the date of Claimant's 1998 injury, provided that:

> Injuries to employees which result in fewer than three days' or three shifts' loss of time from work, or no permanent physical impairment, or no fatality to the employee shall be reported by the employer only to the insurer of said employer's worker's compensation insurance liability…

See Pierce-Kouyate, W.C. No. 4-717-784 (ICAO, November 21, 2007). As found, Claimant missed no time from work. He presented no persuasive evidence establishing any permanent physical impairment, and the injury did not result in a fatality. Accordingly, Employer was only required to report the injury to its insurer, and it did so.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The claims for benefits in W.C. No. 4-723-662, against the Employer and Wausau Insurance Company, and in W.C. No. 4-703-202, against Lumbermen's Underwriting Alliance, are hereby denied and dismissed.

B. Any and all claims for compensability and benefits in W.C. No. 4-665-972, against the Employer and Employers Compensation Insurance Company are hereby reserved for future decision.

DATED this_____day of May 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-777-948

ISSUE

The issue presented for determination at hearing was whether Claimant was responsible for his wage loss and thus not entitled to temporary total disability benefits (TTD).

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant was employed by the Employer as a maintenance man. The Employer is a bakery business.

2. The Employer issued a pass card to employees that operated entrance/exit doors from the Employer's business establishment. Claimant used that card to exit and enter the Employer's business. The Employer is able to monitor an employee's entrance and exit from the Employer's business through the use of this card.

3. In December 2008, Claimant was undergoing chemotherapy for cancer. He was taking a number of drugs during the workday. Claimant underwent chemotherapy on Saturdays and received shots for his blood on Monday and Thursday. Claimant testified that he did not miss time from work due to illness during this period. However, the Employer accommodated Claimant's need to take breaks during the workday due to the fact that he sometimes did not feel well because of cancer or Claimant's treatment.

4. Claimant was counseled more than once to advise his supervisor of his absence whenever he needed to leave work and take a break because he was not feeling well.

5. On October 29, 2008, employment records reflect that Claimant was reinstated to his position and he was warned that, if he had any safety violations or performance issues during the next twelve months, he would be terminated from employment.

6. On December 15, 2008, when Claimant failed to comply with the Employer's instructions to advise his supervisor of any mid workday absence due to illness, he was counseled by his managers on December 17, 2008. On December 17th, Claimant was told that the key card records reflected that, on December 15th, he left the workplace five times without reporting to his supervisor that he was feeling ill and taking a break, as Claimant had been instructed. Claimant was again warned that he needed to comply with the Employer's instructions with regard to reporting his absence from the workplace whenever he felt ill during the workday.

7. On December 23, 2008, Claimant again left the workplace midday due to illness without advising his supervisor of his absence. The Employer's plant manager testified credibly at hearing that Claimant's key card records for December 23rd reflected that Claimant left work numerous times.

8. On December 29, 2008, Claimant was terminated from employment for poor job performance as a result of his failure to comply with his managers' request that he advised them when he was taking a break during the workday due to illness. The credible and persuasive evidence presented at hearing established that Claimant engaged in a volitional act, which caused his wage loss

9. Accordingly, under Sections 8-42-103(g) and 8-42-105(4), Claimant is not entitled to TTD because he is responsible for his wage loss.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act) Sections 8-40-101 through 8-47-111, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving by a preponderance of the evidence that his injury arose out of the course and scope of his employment. Section 8-41-301(1), C.R.S.; *See City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interests. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

3. The ALJs factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

4. To receive temporary disability benefits, the claimant must prove the injury caused a disability. Section 8-42-103(1), C.R.S. ; *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542(Colo. 1995). As stated in *PDM, supra,* the term "disability" refers to the

claimant's physical inability to perform regular employment. *See also, McKinley v. Bronco Billy's*, 903 P.2d 1239(Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with Section 8-42-105(3)(a)-(d), C.R.S.

5. Under Sections 8-42-105(4) and 8-42-103(1)(g), the claimant is precluded from receiving TTD if he is found to be responsible for his wage loss. The concept of "responsibility" in sections 8-42-105(4) and 8-42-103(1)(g), is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg, supra*. "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994). Fault does not require willful intent. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996)(unemployment insurance). The claimant is not at fault if the termination is due to claimant's physical or mental inability to perform assigned duties, but poor job performance can be claimant's fault. *Johnston v. Deluxe/Current Corporation*, W.C. No. 4-376-417 (Industrial Claim Appeals Office, June 7, 1999).

6. The credible and persuasive evidence presented at hearing established that Claimant engaged in a volitional act, which caused his wage loss. Claimant, though suffering with cancer and cancer treatment, was accommodated by the Employer. The evidence established that the Employer allowed Claimant to take breaks during the workday whenever he did not feel well. The Employer's request was that Claimant advised his supervisor whenever he was taking a break. Claimant took breaks due to the fact that he did not feel well, but he did not advise his supervisor.

7. The employment records reflected that Claimant was warned in October 2008 and on December 17, 2008 to comply with the Employer's work rules or he would be terminated from employment. The evidence further established that on December 23, 2008 Claimant again failed to comply with the Employer's work rules and again failed to advise his supervisor of his need to leave the work and take a break due to illness. This is found to have been a volitional act, which caused Claimant's termination from employment.

8. Since Claimant is responsible for his wage loss, he is not entitled to temporary total disability benefits under Sections 8-42-103(1)(g) and 8-42-105(4).

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

DATED: May 4, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-706-159

ISSUES

The matters determined herein are medical benefits, specifically, payment for a brain magnetic resonance image ("MRI") and treatment for complex regional pain syndrome ("CRPS").

FINDINGS OF FACT

1. On September 7, 2006, claimant sustained an admitted industrial injury to his right upper extremity.

2. In July 2003, claimant suffered a previous low back injury, for which Dr. Finn was providing treatment.

3. On November 22, 2006, Dr. Walden performed surgery to repair the right rotator cuff and to perform an acromioplasty. Following surgery, claimant was in a sling for eight weeks.

4. In February 2007, claimant underwent injections to the right shoulder. On March 14, 2007, Dr. Walden performed a second right shoulder surgery for adhesive capsulitis debridement, release and manipulation. Claimant was again placed in a sling.

5. Claimant reported continuing problems with significant posteromedial right elbow pain with a sense of instability of the ulnar nerve and some numbness and tingling in the fourth and fifth fingers of his right hand.

6. On April 9, 2007, Dr. Katharine Leppard examined claimant.

7. On May 3, 2007, Dr. Walden reexamined claimant and noted possible sympathetically-mediated pain. He referred claimant back to Dr. Leppard.

8. On May 10, 2007, Dr. Leppard performed electromyography/nerve conduction studies ("EMG"). The EMG showed right ulnar neuropathy at the elbow.

9. On June 14, 2007, Dr. Leppard reexamined claimant and saw no evidence on physical examination of sympathetically mediated pain. Claimant demonstrated no allodynia, no vasomotor, and no pseudomotor changes.

10. On June 27, 2007, Dr. Timothy Hart performed ulnar nerve decompression and stabilization at the right elbow.

11. Following the right elbow ulnar nerve decompression, claimant complained of continuing numbness and tingling in the fourth and fifth fingers. He also reported that when his surgical scar was manipulated, he had burning tingling in both ankles. Claimant continued to complain of a myriad of problems throughout his body including electric shock-like sensations, as well as shocking pains in his right arm, his penis, and his right ankle and his legs giving out. Claimant was referred to Dr. Rawat, a neurologist, to assess his continuing complaints.

12. On August 7, 2007, Dr. Rawat examined claimant and noted that motor strength was difficult to assess in his right arm because of pain, but claimant appeared to have adequate strength and no obvious atrophy or fasciculations. In his legs he also appeared to have questionable weakness on the right when compared to the left, but again the strength appeared to be relatively adequate. Dr. Rawat found no obvious swelling of the arm or leg or significant difference in temperature on the right when compared to the left. Dr. Rawat concluded that claimant had some signs, including hyperpathia and allodynia of his right arm and possibly his right leg, consistent with reflex sympathetic dystrophy/CRPS. Dr. Rawat also noted, "Clearly given the right-sided symptoms and his atrial fibrillation, we need to exclude stroke or a central cause for his unusual symptoms." Consequently, Dr. Rawat referred claimant for a brain MRI. Dr. Rawat also noted that depression might be a significant factor for claimant's symptoms.

13. On August 9, 2007, Dr. Finn provided Claimant with an epidural steroid injection. Dr. Finn conducted a physical examination and stated, in pertinent part: "There was no discoloration comparing right to left upper extremity or lower extremity. There was no loss of hair patterns in the upper and lower extremities. He did have some ridging of the great toenail on the left compared to right. There was no swelling involving the upper or lower extremities. DIAGNOSES: Pain disorder, uncertain etiology. ASSESSMENT: The patient does not fit the criteria for complex regional pain syndrome/RSD in my opinion… I am doubtful of the diagnosis of CRPS as I do not feel he would fulfill the criteria based on allodynia alone."

14. The August 14, 2007, brain MRI was interpreted as essentially normal and showed no indication of a stroke.

15. On August 30, 2007, Dr. Hart explained to claimant that there is no electrical connection between the manipulation of the posteromedial aspect of his right elbow and burning and tingling in his ankles. Dr. Hart analogized the situation to turning the light on in the kitchen and have the downstairs bathroom light go on and off. Claimant also complained that manipulation of the right elbow scar caused his abdominal musculature to contract. Dr. Hart also told claimant that he had no explanation for that symptom.

16. On September 7, 2007, claimant underwent a bone scan. Dr. Moore interpreted the results: "There is mild increased trace uptake in both acromioclavicular joints,

slightly greater on the right side as well as over both coracoid processes. Increased uptake is noted at the articulations between the medial aspect of the right first rib and manubrium and to a lesser extent at the articulation between the first rib and manubrium on the left as well. Minimal uptake is noted in the posterior aspect of the right tenth and eighth ribs. Both of these areas are relatively faint and may be related to old healing rib fracture. Note is made there is very subtle minimal uptake involving the right humeral head and shaft of the right humerus compared to the left humerus. Uptake within the soft tissues however appears symmetric. Impression: 1. Mild increased uptake involving the right acromioclavicular joint, right humeral head and to a lesser extent the right humeral shaft. Findings are asymmetrical with the left although the intensity of the activity in the soft tissues is symmetric and not increased. The relatively minimal increased asymmetric boney uptake and lack of significant uptake in the soft tissues raises the possibility of remote or resolving reflex sympathetic dystrophy. The findings would not be typical for acute reflex sympathetic dystrophy as the asymmetric uptake is relatively minimal. 2. Minimal uptake in the posterior aspect of right ribs probably reflecting old or healing rib fractures."

17. On October 22, 2007, Dr. Pitzer performed an independent medical examination ("IME") for respondents. He diagnosed probably myofascial pain and ulnar neuropathic pain. He concluded that it was unlikely that claimant had CRPS.

18. On November 12, 2007, Dr. Rawat diagnosed right upper extremity CRPS and referred claimant to Dr. Koons.

19. On January 3, 2008, Dr. Conwell performed thermogram testing only on claimant's legs because claimant complained that he could not stand the testing on his arms. The lower extremity thermogram was normal.

20. On January 21, 2008, Dr. Koons concluded that claimant's reflex sympathetic dystrophy had spread to the right lower extremity.

21. On April 22, 2008, Dr. Finn concluded that claimant did not have CRPS based solely on allodynia.

22. On February 25, 2009, Dr. Hall performed an IME for claimant. Dr. Hall recommended diagnostic blocks to determine if claimant had CRPS.

23. Dr. Rawat testified by deposition and admitted that he was not an expert in CRPS and was not familiar with the Division of Workers' Compensation Medical Treatment Guidelines for CRPS. He agreed, however, that eight diagnostic tools are available to aid a medical practitioner in diagnosing CRPS:

1. MRI scan of the brain (for the limited purpose of ruling out a stroke).
2. MRI scan of the neck.
3. EMG/NCV studies.
4. Thermogram.

5. Bone Scan.
6. QSART test.
7. Sympathetic Nerve Block.
8. Nerve Biopsy.

24. Claimant had test #1 because Dr. Rawat wanted to rule out whether claimant's symptoms were the result of a stroke. Claimant did not have test #2. Although Claimant did undergo test #3, the test was performed prior to Claimant's elbow surgery and was positive only for ulnar neuropathy not for CRPS. Claimant had test #4, a thermogram, which was interpreted as normal. Claimant did not have tests #6, #7, or #8. Only test #5, the bone scan, was positive for CRPS, but the conclusions are complicated by the right shoulder surgeries.

25. In his deposition testimony, Dr. Rawat concluded that claimant probably had neuropathic pain consistent with CRPS based upon hyperpathia and allodynia. He continued to recommend stellate ganglion blocks as reasonable even at this late date because they would block pain signals along small nerve fibers and the vasomotor and pseudomotor fibers.

26. Dr. Koons, a neurosurgeon, testified at hearing that he also was not familiar with the Medical Treatment Guidelines for CRPS. He agreed that he could not say that claimant probably had centralized pain, but could only say that it was possible. He noted that CRPS has an early sympathetic effect, but that effect lessens over time. He noted that, after six months, sympathetic blocks will not cure CRPS and one is left with medication therapy and possible spinal stimulation. Dr. Koons agreed that claimant's history of pain indicates neuropathic pain, but not necessarily CRPS.

27. Dr. Hall testified at hearing that claimant had neuropathic pain and sympathetic symptoms in the upper quadrant. Dr. Hall listed the three phases of CRPS: 1. Acute phase, which is more clinically obvious; 2. Chronic (Ischemic) phase; and 3. "Burn-out phase" (Atrophic). Dr. Hall then stated that Claimant was not in the acute phase, "if he ever was in one." Dr. Hall noted that claimant was not in the chronic stage and candidly admitted that claimant has no solid clinical signs. He then testified that he thinks Claimant might be in the atrophic phase, but he does not fulfill all criteria. He noted that, by the time one diagnoses CRPS, it almost too late to treat it with sympathetic blocks. He agreed that claimant did not have strong signs of CRPS because he had no vasomotor or pseudomotor changes. Dr. Hall agreed that it was possible the bone scan merely showed hot spots form the right shoulder surgeries.

28. Dr. Pitzer testified at the hearing that the minimal uptake found on the bone scan is medically probably related to the extensive insult to the bones of the shoulder during the surgical procedures. He agreed that claimant might have neuropathic pain, but not a diagnosis of CRPS. He recommended repeat EMG and thermography testing. Dr. Pitzer agreed that the Medical Treatment Guidelines did not absolutely require two positive tests to diagnose CRPS and that strong clinical findings could support such a diagnosis. He did not think that claimant had those strong clinical findings. He noted that

sympathetic blocks were no longer recommended for claimant because he did not necessarily have any sympathetic component to his symptoms.

29. Claimant has failed to prove by a preponderance of the evidence that he has CRPS. Three physicians, Dr. Rawat, Dr. Koons, and Dr. Hall, think that he probably has CRPS, despite very weak findings and test results. Three physicians, Dr. Pitzer, Dr. Leppard, and Dr. Finn, do not think that he probably has sympathetically-mediated pain. The consensus seems to be that claimant has neuropathic pain. In one sense, the diagnosis is now almost irrelevant. The treatment for that neuropathy is the same as for chronic CRPS. The preponderance of the evidence is that stellate ganglion blocks are no longer probably effective to diagnose or treat CRPS. The remaining treatment is through pain control. Claimant clearly needs additional treatment. The preponderance of the evidence does not demonstrate that he needs treatment for CRPS.

30. Claimant has proven by a preponderance of the evidence that the MRI of Claimant's brain performed on August 14, 2007 was reasonably necessary to diagnose the occupational injury. The MRI was to rule out a stroke as a differential diagnosis. That procedure was reasonably necessary before diagnosing or treating CRPS.

CONCLUSIONS OF LAW

1. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). As found, claimant has failed to prove by a preponderance of the evidence that he needs treatment for CRPS.

2. As found, claimant has proven by a preponderance of the evidence that the brain MRI was reasonably necessary to optimize treatment for the work injury. This case is similar to *Public Service Co. of Colorado v. Industrial Claim Appeals Office*, 979 P.2d 584 (Colo. App. 1999). Respondents' analogy to a referral to a dermatologist for suspected non-occupational melanoma is not a good analogy. Although treatment for an unrelated condition is not necessary in the current matter, diagnosis of any such unrelated condition was necessary in order to treat the work injury. If the brain MRI showed a stroke, the referral to another provider for treatment of the stroke would likely not be related to the work injury. If the MRI did not show a stroke, treatment for neuro-

pathic or sympathetic pain from the work injury is necessary. Consequently, the brain MRI was ancillary to treatment of the work injury and is the responsibility of the insurer.

ORDER

It is therefore ordered that:

1. The insurer shall pay for the brain MRI referred by Dr. Rawat.

2. Claimant's claim for treatment for CRPS is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

DATED: May 5, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-764-694

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease during the course and scope of her employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of an occupational disease.

FINDINGS OF FACT

1. Employer operates a health care facility. Claimant began working for Employer in 2000 in a support staff or clerical position. She did not have an assigned workstation and did not regularly sit at a specific desk.

2. In approximately January 2006 Claimant's job duties changed. She was assigned to a specific workstation and sat down for eight hours each day for four days per week. Claimant's position required her to "check-in" approximately eight to twenty patients each day.

3. Approximately three months after beginning her new job duties Claimant developed pain in her left lower back and left hip. She attributed her pain to her workstation and repetitive job duties. Claimant explained that, as each patient entered Em-

ployer's facility, she was required to move her chair with her left leg in order to retrieve the patient's forms from a printer. She commented that she was also required to move her chair sideways in order to access a cash drawer at her workstation. She stated that she "checked in" approximately 8-20 patients each day and was required to move her chair twice while "checking in" each patient. On June 27, 2008 Claimant reported her injury to Employer.

4. On July 2, 2008 Claimant visited Diego Osuna, M.D. for medical treatment. Claimant reported left lower back pain. Dr. Osuna commented that it was questionable whether Claimant's lower back pain was caused by her work for Employer. He remarked that he would make a final determination regarding causation after evaluating Claimant's workstation.

5. On July 7, 2008 Dr. Osuna evaluated Claimant's workstation. He commented that it was unlikely that Claimant's back pain was causally related to her job duties for Employer because her job responsibilities were not substantially different from the usual activities of daily living.

6. On July 9, 2008 Dr. Osuna issued an addendum detailing his opinion regarding the causal relationship between Claimant's lower back pain and work activities. He explained:

> Her claimed work related exposure is moving laterally, mostly to the right within a horizontal space of four feet. Observation of her work station indicates to me that her work activities would require bilateral lateral movement in a rolling chair without significant resistance of 1-2 feet either way. Furthermore, the natural motion of lateral movement while sitting in a rolling chair would involve not only pushing off with one foot but also pulling with the other significantly reducing the strain on one side. There is also a significant delay in reporting this as a work related exposure causing her symptoms. She had had the hip pain for two years and the back pain for six months.

Dr. Osuna concluded that Claimant's job duties were "less than 50% likely to be the cause of her diagnosis of mechanical low back pain." He noted the lack of temporal proximity between the development of her symptoms and the delay in reporting her injuries. Dr. Osuna also explained "it is not biologically plausible that the work related exposure is the proximate cause of her pain as it is not significantly different from activities of daily living."

7. On September 26, 2008 Employer conducted an ergonomic evaluation of Claimant's workstation. The report noted that Claimant had been experiencing lower back and left hip pain for several years "especially with pushing chair with left foot and twisting left hip." The goals of the analysis included identifying high-risk repetitive movements and possible modifications to reduce the risk of injury. The report provided a detailed review of Claimant's workstation and mentioned several "awkward postures" including: (1) "reaching to side to retrieve PVR from printer;" (2) "forward reach above

shoulder level when sitting to retrieve ID card;" and (3) "moving chair sideways and reaching to side to use cash drawer." The report thus noted five recommended changes to Claimant's workstation.

8. On August 4, 2008 W. Rafer Leach, M.D. conducted an independent medical examination of Claimant. He stated that Claimant had suffered a "lumbar strain with facetogenic pain source due to repetitive insult." Dr. Leach thus concluded "causation, I believe, is clear within a reasonable degree of medical probability and related to the patient's work environment over the last two years."

9. Dr. Leach testified at the hearing in this matter. He reiterated that Claimant's work duties for Employer caused her lower back condition. Emphasizing the ergonomics report, Dr. Leach explained that Claimant only developed left lower back and hip pain after her workstation changed in 2006. He also noted that Claimant had not suffered any preexisting complaints of left lower back or hip pain and had not changed her activities of daily living.

10. On November 8, 2008 Claimant underwent an independent medical examination with L. Barton Goldman, M.D. Dr. Goldman concluded that Claimant's mechanical lower back pain was not caused by her job duties for Employer. He commented that the literature in Level II accreditation courses regarding causation for occupational diseases typically emphasized prolonged awkward positioning of 30 to 45 degrees at the hip and back while standing for more than 2-4 hours per day and repetitive bending and twisting. He noted that the definition of "repetitive" "involves repeating a movement no less than once every 2-5 minutes." Agreeing with Dr. Osuna, Dr. Goldman remarked that Claimant's mechanism of injury fell "substantially within the realm of medical possibility and not probability." Dr. Goldman explained that Claimant did not undertake repetitive movements in performing her job duties and failed to utilize "appropriate compensatory movements" to reduce her symptoms. He also commented that Claimant's symptoms did not improve on her days home from work and she exhibited "substantial unconscious symptom magnification" during physical examination. Finally, Dr. Goldman stated that Claimant's activities of daily living involved the same movements as her job activities for Employer.

11. Dr. Goldman testified at the hearing in this matter. He reiterated that Claimant's job duties for Employer did not cause her lower back injuries. In reviewing a September 29, 2008 MRI of Claimant's lumbar spine, he explained that the findings were consistent with those of any person over 30 years of age. Dr. Goldman noted that the MRI findings of degenerative spinal canal compromise at L4-L5 and L5-S1 and bilateral neuroforaminal encroachment at L5-S1 did not contribute to Claimant's mechanical lower back pain. He explained that, based on Claimant's description of her work activities, the MRI should have revealed one-sided instead of bilateral findings. Finally, based on Claimant's pain complaints, Dr. Goldman would have expected the MRI to reveal more pathology at the L3 level and possibly the L4-L5 level. Although Dr. Goldman acknowledged that Claimant's job duties possibly exacerbated her lower back condition, her job duties did not aggravate or accelerate her underlying symptoms.

12. Claimant has failed to establish that it is more probably true than not that she sustained an occupational disease during the course and scope of her employment with Employer that did not arise from a hazard to which she would have been equally exposed outside of her employment. Claimant's lower back condition thus was not caused, accelerated, intensified or aggravated by her duties for Employer. Dr. Osuna credibly concluded that Claimant's job duties were "less than 50% likely" to be the cause of her mechanical low back pain. He noted the lack of temporal relationship between the development of her symptoms and the delay in reporting her injuries. Dr. Osuna also explained that, because Claimant's job duties were not significantly different from activities of daily living, it is unlikely that they were the proximate cause of her symptoms. Dr. Goldman also persuasively explained that Claimant's job duties did not cause her mechanical lower back pain. He credibly remarked that Claimant did not undertake repetitive movements in performing her job duties, her symptoms failed to improve while at home and she exhibited "substantial unconscious symptom magnification" during physical examination. Dr. Goldman also commented that Claimant's lumbar MRI findings were consistent with those of any person over the age of 30 and were inconsistent with her pain symptoms. In contrast Dr. Leach relied on the ergonomic evaluation of Claimant's workstation to conclude that Claimant's mechanical lower back pain was caused by her job duties for Employer. However, because Dr. Leach's opinion is predicated almost exclusively on the temporal relationship between Claimant's change in workstation and her development of lower back pain, it is less persuasive than the opinions of doctors Osuna and Goldman.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and ac-

tions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the ALJ. *Faulkner*, 12 P.3d at 846.

5. The test for distinguishing between and accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

7. As found, Claimant has failed to establish by a preponderance of the evidence that she sustained an occupational disease during the course and scope of her employment with Employer that did not arise from a hazard to which she would have been equally exposed outside of her employment. Claimant's lower back condition thus was not caused, accelerated, intensified or aggravated by her duties for Employer. Dr.

Osuna credibly concluded that Claimant's job duties were "less than 50% likely" to be the cause of her mechanical low back pain. He noted the lack of temporal relationship between the development of her symptoms and the delay in reporting her injuries. Dr. Osuna also explained that, because Claimant's job duties were not significantly different from activities of daily living, it is unlikely that they were the proximate cause of her symptoms. Dr. Goldman also persuasively explained that Claimant's job duties did not cause her mechanical lower back pain. He credibly remarked that Claimant did not undertake repetitive movements in performing her job duties, her symptoms failed to improve while at home and she exhibited "substantial unconscious symptom magnification" during physical examination. Dr. Goldman also commented that Claimant's lumbar MRI findings were consistent with those of any person over the age of 30 and were inconsistent with her pain symptoms. In contrast Dr. Leach relied on the ergonomic evaluation of Claimant's workstation to conclude that Claimant's mechanical lower back pain was caused by her job duties for Employer. However, because Dr. Leach's opinion is predicated almost exclusively on the temporal relationship between Claimant's change in workstation and her development of lower back pain, it is less persuasive than the opinions of doctors Osuna and Goldman.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

DATED: May 5, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-766-678

ISSUE

¬ Did the respondents prove by a preponderance of the evidence that the claimant willfully violated a safety rule so as to justify reduction of his compensation by fifty percent?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. On July 29, 2008, the claimant sustained injuries in motor vehicle accident when the tractor-trailer truck that he was driving left the road east of Wolf Creek Pass.
2. The insurer admitted liability for this accident, admitting for medical, temporary disability and permanent disability benefits. However, in its admissions the insurer reduced the claimant's indemnity compensation on grounds that he violated safety rules of the employer within the meaning of § 8-42-112(1)(b), C.R.S. The claimant applied for a hearing to challenge this reduction of benefits.
3. The employer has a written rule against "sleeping on the job." The employer also has a rule that truck drivers are required to pull off the road and rest if they feel sleepy while operating a company vehicle. The claimant admitted that he was aware of these rules and agreed that they are "safety rules" adopted for the protection of employees and the public at large.
4. On July 27, 2008, at approximately 10:00 p.m., the claimant began a trip from Denver, Colorado to Farmington, New Mexico for the purpose of delivering food products to the employer's clients. After making four deliveries on the morning of July 28, 2009, the claimant began a 10-hour layover at a motel in Farmington.
5. On July 28, 2008, at approximately 9:30 p.m., the claimant returned to his truck and made three additional deliveries. The claimant then began the return trip to Denver, leaving the town of Aztec at approximately 1:30 a.m. on July 29, 2008.
6. At approximately 3:00 a.m. the claimant reached the town of Pagosa Springs, Colorado. The claimant credibly testified that by the time he arrived at Pagosa Springs he was feeling drowsy and pulled off of the road to take a nap. The nap lasted until approximately 3:45 a.m.
7. The claimant then resumed his trip and successfully negotiated Wolf Creek Pass. However, at approximately 5:15 a.m., or one and one-half hours after taking the nap, he drove off the road and sustained the injuries that are the subject of this claim. Based on the diagram of the accident drawn by the claimant, the ALJ finds that the accident occurred on a straight stretch of highway. The claimant's truck drove off of the right side of the road, then veered to the left across the westbound lane of traffic and came to rest in a field on the north side of the road.
8. While in the hospital after the accident the claimant was interviewed by a State Trooper. The claimant initially told the trooper that he did not know what happened. However, after speaking with the trooper the claimant surmised that he fell asleep at the wheel causing him to drive off of the right side of the road. He then over-corrected causing the truck to drive off the north side of the highway.
9. On July 30, 2008, the claimant completed a written report to the employer stating that he fell asleep at the wheel, drove off the right side of the road then verred off of the left side of the highway while trying to control the vehicle.
10. The ALJ finds as a matter of fact that on July 29, 2008, the claimant fell asleep at the wheel causing him to drift off of the right side of the road. The ALJ further finds the claimant was awakened when the truck left the road and he then overcorrected causing the truck to cross the westbound lane and drive off the north side of the highway. The ALJ finds that this incident caused the injuries for which the respondents have admitted liability.
11. The ALJ finds that the respondents failed to prove that the claimant's action in suddenly falling asleep and driving off the road rises to the level of a "willful" violation of

the employer's rules against falling asleep on the job and failing to stop and rest when the driver experiences sleepiness.

12. The claimant credibly testified, and the ALJ finds, that the claimant did not notice or experience sleepiness or drowsiness immediately prior to the occurrence of the accident east of Wolf Creek Pass. In this regard, the ALJ credits the claimant's testimony that approximately one and one-half hours before the accident he felt sleepy. At that time the claimant stopped the truck and took a nap in Pagosa Springs. The respondents failed to introduce credible or persuasive evidence to contradict or discredit the claimant's testimony that he took a nap in Pagosa Springs. Based on this evidence the ALJ infers that the claimant willingly obeyed the employer's safety rules against driving while drowsy. Further, the ALJ infers that if the claimant had consciously experienced or noticed any drowsiness after crossing Wolf Creek Pass he would most probably have stopped his truck and rested. Moreover, considering the amount of driving the claimant had done since 10:00 p.m. on July 27, 2009, and the fact that he had just negotiated Wolf Creek Pass while driving a tractor-trailer rig, the ALJ does not find it implausible that the claimant suddenly fell asleep at the wheel without any conscious awareness that he was too sleepy to stay awake and safely operate the truck. The ALJ finds that, at most, the claimant was negligent in continuing to drive the truck after he crossed Wolf Creek Pass.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The respondents contend that evidence establishes the claimant willfully violated the employer's safety rules by falling asleep at the wheel and wrecking the truck. The ALJ disagrees and finds that the respondents failed to prove that the claimant committed any "willful" violation of the employer's safety rules.

Section 8-42-112(1)(b), C.R.S., provides for a fifty-percent reduction in compensation where the claimant's injury results from his willful failure to obey any reasonable rule adopted by the employer for the safety of the employee. The respondents shoulder the burden of proof to establish by a preponderance of the evidence that the injury was the result of a willful violation of a safety rule. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reason-

ableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

The respondents satisfy the burden to prove a "willful" violation by showing that the employee knew of the safety rule yet intentionally performed the forbidden act. The respondents need not prove that the employee, having the rule in mind, determined to break it. *Stockdale v. Industrial Commission*, 76 Colo. 494, 232 P. 669 (1925). However, mere negligence is not sufficient to demonstrate willful conduct. *Bennett Properties Co. v. Industrial Commission,* 165 Colo. 135, 437 P.2d 548 (1968); *Johnson v. Denver Tramway Corp.,* 171 Colo. 214, 171 P.2d 410 (1946).

As determined in Findings of Fact 11 and 12, the respondents failed to prove it is more probably true than not that the claimant willfully violated the employer's safety rules against sleeping on the job and requiring drivers to stop and rest if they feel sleepy or drowsy. Rather, the ALJ finds the claimant credibly testified that he did not feel sleepy immediately before the accident. Although the claimant may have been negligent in suddenly falling asleep at the wheel, the respondents failed to prove that he consciously operated the vehicle while sleepy. Thus, the respondents failed to prove a "willful" violation of any safety rule and the requested reduction in compensation must be denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The respondents' request to reduce compensation based on the claimant's alleged violation of two safety rules is denied. The respondents shall pay the admitted compensation without regard to the alleged safety rule violations.

2. All issues not determined herein are reserved for future determination.

DATED: May 5, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

WORKERS' COMPENSATION NO. WC 4-758-412

ISSUES

The issue for determination is temporary disability benefits.

FINDINGS OF FACT

1. It has previously been determined that Claimant sustained a compensable injury on April 27, 2008. Respondents have admitted for an average weekly wage of $474.66 ($67.809 per day).
2. Claimant continued to work for some period following the compensable injury. Claimant did suffer a wage loss following the injury. For the pay period ending May 13, 2008, Claimant earned $160.00, an average of $11.429 per day from the date of the injury. Claimant lost wages due to the injury at the rate of $56.38 per day or $394.66 per week.
3. Employer sent Dr. Gellrick, an authorized treating physician, a job description involving modified duties. The job description involved work on the line assembling food orders. The job description also included cleaning duties as assigned. Dr. Gellrick approved the modified job duties on July 16, 2008.
4. Employer sent Claimant an offer of modified employment on July 17, 2008. Claimant was directed to report to work on July 30, 2008, at 6:00 p.m.
5. On July 21, 2008, Dr. Gellrick modified Claimant's restrictions. Dr. Gellrick restricted Claimant from repetitive bending at the waist. On July 28, 2008, Dr. Gellrick further limited Claimant from walking or standing more than five or ten minutes per hour. With this restriction Claimant could not work the line and assemble the food orders. Claimant was capable of sitting down and wiping trays.
6. Claimant testified that he returned to work on July 30, 2008. Rodriquez, Claimant's supervisor who no longer works for Employer, also testified that Claimant returned to work July 30, 2008. Employer's pay records show that Claimant worked 6.02 hours on July 24, 2008, 6.00 hours on July 25, 2008, 0.43 hours on July 26, 2008, no hours on July 27, 2008, 0.35 hours on July 28, 2008, and no hours thereafter. This testimony of Claimant and Rodriquez is not credible and persuasive. It is found that Claimant worked the hours stated in the Employer's records.
7. Claimant was temporarily and totally disabled from May 14, 2008, through July 23, 2008. Claimant was temporarily partially disabled from July 24, 2008, to July 29, 2008.
8. Claimant testified that on the last day he worked for Employer, he punched in and worked ten minutes. He was then directed to talk to Doreen. He testified that Doreen told him to work on the line. Work on the line was beyond Claimant's restrictions. Claimant testified that he told Doreen that he was not able to work on the line. He testified that Doreen called Mario, the manager. He testified that Doreen handed him the phone and that Mario told him that he had to work the line. Claimant testified that he told Mario that he was not able to work the line. He testified that he gave the phone back to Doreen and that Doreen spoke to Mario. He testified that Doreen then punched him off work and told him to go home and to call when he felt better. He testified that he

then went home. He testified that he called Mario and left messages on October 8 and 9, 2008, to state that he felt better. He testified that Mario never called him back.

9. Mario testified that Claimant did work about five days in July 2008. He testified that he did not ask Claimant to work the line, and did not tell anyone to direct Claimant to work the line. Mario testified that he told Claimant's supervisors that Claimant was to wipe trays and could sit down while wiping the trays. He testified that he saw Claimant sitting and looking out the window. He testified that Claimant said he was not feeling well. He testified that Claimant then left work. He testified that Claimant came back the next day and left early again. He testified that Claimant did appear for work again. He testified that he did not have the conversation with Claimant and Doreen that Claimant had testified to.

10. The testimony of Mario is credible and persuasive. It is found that Claimant was not directed to work the line and that Doreen did not tell Claimant to go home and punch him off of work. It is found that the work Claimant performed from July 24, 2008, to July 28, 2008, was within his restrictions. It is found that Claimant left work on July 28, 2008, and did not appear for work again. Employer had work available for Claimant on July 28, 2008, that was within Claimant's restrictions. Claimant did not leave work due to the compensable injury.

11. Claimant did not report to work on July 30, 2008, as directed in the letter of July 17, 2008.

CONCLUSIONS OF LAW

Temporary disability benefits are payable if an injury or occupational disease causes disability. If the disability lasts more than two weeks, disability benefits are payable from the day the injured worker leaves work as a result of the injury. Section 8-42-103(1)(b), C.R.S.

In cases of temporary partial disability, benefits are payable at the rate of two-thirds of the difference between the average weekly wage at the time of the injury and the average weekly wage during the period of temporary disability. Section 8-42-106(1), C.R.S. Temporary partial disability benefits end when the attending physician gives the claimant worker a written release to return to modified employment, such modified employment is offered to the claimant in writing, and the claimant fails to begin such employment. Section 8-42-106(2)(b)(I), C.R.S.

In cases of temporary total disability, benefits are paid at the rate of two-thirds of the claimant's average weekly wage. Section 8-42-105(1), C.R.S. Temporary total disability benefits are payable until the occurrence of any of the events listed in Section 8-42-111(3), C.R.S. Temporary disability benefits end when a claimant returns to modified employment or when an attending physician gives the claimant a release to return to modified employment, the employment is offered to the claimant in writing, and the claimant fails to begin such employment. Sections 8-42-105(3)(b) and (d)(1), C.R.S.

Claimant has established by a preponderance of the evidence that he is entitled to temporary partial disability benefits from April 29, 2008, to May 13, 2008, inclusive. The difference between Claimant's average weekly wage at the time of the injury and

the average weekly wage during this period of disability is $394.66. Temporary partial disability benefits is payable for this period at the rate of $263.11 per week.

Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 14, 2008, through July 23, 2008. Temporary total disability benefits are payable at the rate of $316.44 per week.

Claimant is entitled to temporary partial disability benefits from July 24, 2008, to July 29, 2008. The preponderance of the evidence shows that Claimant returned to work to a modified position on July 24, 2008, and had a loss of earnings. Respondents have established by a preponderance of the evidence that an attending physician gave Claimant a release to return to modified employment, modified employment was offered to Claimant in writing, and Claimant failed to begin the employment on July 30, 2008. No wage information for the period from July 24 to July 29, 2008, was presented. Determination of the rate of temporary partial disability benefits for this period is reserved.

Claimant's request for temporary disability benefits on and after July 30, 2008, is denied.

Insurer is liable for interest at the rate of eight percent per annum on any benefit not paid when due. Section 8-43-410, C.R.S.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant temporary partial disability benefits at the rate of $263.11 per week from April 29, 2008, to May 13, 2008.
2. Insurer shall pay Claimant temporary total disability benefits from May 14, 2008, to July 23, 2008, at the rate of $316.44 per week.
3. Insurer shall pay Claimant temporary partial disability benefits from July 24, 2008, to July 29, 2008, at a rate to be determined.
4. Claimant's request for temporary disability benefits on and after July 30, 2008, is denied.
5. Insurer shall pay interest to Claimant at the rate of 8% per annum on all benefits not paid when due.
6. Issues not determined by this order are reserved.

DATED: *May 6, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-771-625

ISSUES

The issues for determination are:

1. Compensability;
2. Medical benefits;
3. Average weekly wage (AWW);
4. Temporary total disability benefits from September 12, 2008 and continuing;
5. Responsible for termination; and
6. Pre-existing condition, personal deviation, idiopathic injury, and going to and from work exception.

STIPULATIONS

1. The parties stipulate to an AWW of $600.00.

2. John Kimura appeared at hearing but did not testify as the parties stipulated that John Kimura owns the vehicle Ron Ida was driving on September 11, 2008. Further, the parties stipulated Mr. Kimura's vehicle did not sustain damage as a result of the alleged motor vehicle incident.

FINDINGS OF FACT

1. Claimant worked as a warehouse helper and driver for the employer. Claimant's job duties included working in the employer's warehouse and occasionally using company trucks to make deliveries/pick ups from the employer's vendors in the Denver, Colorado area.

2. Debbie Baker is the owner and president of employer. Debbie Baker testified credibly that when claimant made pick-ups or deliveries, the employer and/or vendor generated pick-up tickets or work orders for each pick-up or delivery.

3. As part of claimant's job, the employer allowed claimant to use the employer's cell phone for business use. Claimant's cell phone number is 720-219-3006. Employer's telephone number is 720-794-7900. Debbie Baker receives and pays for claimant's cell phone bills related to telephone number 720-219-3006.

4. Shaw Industries is one of the employer's vendors. Shaw Industries only makes delivers directly from its facility to employer. Employer does not make pick-ups from Shaw Industries.

5. When Shaw Industries makes a delivery, the employer would have an accompanying work order. Employer has no work order for Shaw Industries for September 11, 2008.

6. The employer has never directed claimant to pick up merchandise or samples from Shaw Industries on Monaco and Smith Road and did not request claimant to make a pick-up on September 11, 2008.

7. September 11, 2008 was a light day for the employer and Dal, Emser Tile and Interceramic were the only authorized trips claimant was requested to take.

8. Claimant testified that he left the employer's business on September 11, 2008 between 11:30 a.m. and 12:15 p.m. He testified after leaving I-70 and Peoria, the area where Dal Tile and Emser tile are located, he got onto I-70 heading westbound.

9. Claimant testified that at approximately 1:00 p.m. he received a telephone call (on the employer's cell phone he was using) from either Angie Baker or Kim Medor, employees of employer. Claimant testified that Angie Baker or Kim Medor asked him to go to Shaw Industries on Monaco and Smith Road for a pick up. Claimant testified at the time of the call, he was in the middle lane on I-70 heading west. Claimant testified that he had already passed the Monaco exit, which he needed to take in order to get to Shaw Industries. Claimant testified he was unable to get over into the right lane to exit until he got to the Brighton Blvd exit. Claimant's testimony is not credible.

10. Claimant testified that he took the Brighton Blvd. exit and was in the left lane with his blinker on, waiting for the light to turn green, in order to turn around to get back on I-70 when he was struck from behind by another truck.

11. Claimant's testimony that while waiting for the light to turn green, in order to turn around to get back onto I-70 for the purpose of going back to Shawn Industries was not credible. The employer did not direct claimant to travel to Shaw Industries. As such, claimant did not confer a benefit upon the employer. Further, claimant's act of exiting off I-70 onto Brighton Blvd. was not part of his job and outside the course and scope of his employment.

12. Angie Baker testified credibly that she did not call claimant on the telephone on September 11, 2008 and direct him to make a pick up from Shaw Industries.

13. Kim Medor testified credibly that she did not call claimant on September 11, 2008 to request that claimant go to Shaw Industries for a pick up.

14. Kim Medor was the secretary answering telephones for the employer on September 11, 2008.

15. Kim Medor and Angie Baker testified credibly they did not talk to claimant on the phone prior to the motor vehicle incident on September 11, 2008.

16. Claimant's testimony that while driving west on I-70 he received a telephone call from either Angie Baker or Kim Medor directing him to travel to Shaw Industries is incredible.

17. The employer's cell phone records demonstrate that no call was made from the employer to claimant prior to the motor vehicle accident.

18. Further, the evidence shows that claimant's testimony regarding the time of the alleged incident is incredible. Claimant has provided inconsistent times of the alleged incident. On the September 11, 2008 medical note from Concentra, claimant reports 13:37 (1:47 p.m.) as being the time of injury. Yet the employer's cell phone records shows claimant calling Ron Ida's telephone number at 1:30 p.m., prior to the alleged incident. Mr. Ida testified he did not know claimant prior to the alleged motor vehicle incident. Claimant reports on the accident report that the accident occurred at 1:45 p.m. Claimant's Workers' Claim for Compensation form notes the incident occurred at 1:30 p.m.

19. Debbie Baker testified that she reviewed the cell phone bill for September 11, 2008 and inquired into a call made at 1:30 p.m. to telephone number 303-981-6267. This number belongs to Mr. Ida.

20. The employer did not request or direct claimant to pick up merchandise or samples from Shaw Industries. The September 11, 2008 motor vehicle accident occurred during a deviation from claimant's employment so substantial as to remove it from the employment relationship. Therefore, claimant was not in the course and scope of employment when he exited off I-70 onto Brighton Blvd. Claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury/

21. Claimant's testimony is incredible in that claimant testified he received a telephone call from Angie Baker or Kim Medor at approximately 1:00 p.m. asking him to travel to Shaw Industries. Claimant alleges at the time of the call, he had passed the Monaco exit heading west on I-70. Claimant misses the Colorado exit and the Vasquez exit and finally took the Brighton Blvd. exit. Claimant notes on the accident report that the accident occurred at 1:45 p.m. However, it is unlikely that if Angie Baker or Kim Medor called claimant at 1:00 p.m., as alleged by claimant, that it would have taken claimant forty-five minutes to travel approximately less than five miles.

22. Claimant's testimony is incredible when he testified that after being struck, he was in shock and when he stepped out of the vehicle, his right ankle was hurting him. Mr. Ida testified he was traveling approximately 5 miles when he "tapped" into the back of the vehicle claimant was driving. Mr. Ida testified there was no damage to the vehicles and no injuries. Mr. Ida credibly testified he observed claimant exiting the vehicle and claimant was not limping, was not bleeding, claimant did not complain he was in pain nor did claimant appear to be injured. There was no damage to the vehicle claimant was driving. It was stipulated that no damage was done to the vehicle Mr. Ida was driving. Angie Baker testified credibly that when she spoke to claimant on the phone after the incident, she asked claimant whether he was injured and that claimant stated he had not been injured in the motor vehicle incident.

23. At the time of the incident, claimant was wearing his seat belt. Ron Ida was slowing down to stop at the light, traveling approximately 5 mph when the truck he was driving tapped the rear end of the truck claimant was driving. After Mr. Ida rear-ended claimant's truck, both he and claimant got out of their respective trucks to see whether there was any damage to the vehicles. Mr. Ida credibly testified he did not observe any damage to the vehicle he was driving and his airbags did not deploy.

24. Claimant was carrying merchandise for the employer in the front of the vehicle and that merchandise was not damaged in the incident.

25. After the accident, Mr. Ida gave claimant his telephone number and the two men went their separate ways. Mr. Ida's cell phone number is 303-981-6267.

26. Claimant's testimony was incredible when he testified Mr. Ida left the scene of the incident. Mr. Ida testified credibly that he did not leave the scene of the incident as alleges by claimant.

27. Angie Baker testified credibly that when claimant returned to employer's premises, claimant did not appear to be in pain and indicated he was not injured.

28. Claimant's alleged complaints of pain are incredible. The First Report of Injury reports injury to claimant's low back. On the Workers' Claim for Compensation form, claimant reports injury to his neck, back, headaches, left wrist, right wrist and right ankle. Yet on the September 11, 2008 medical note from Concentra, claimant also reports injury to his arm, elbow, left ear and knees.

29. The evidence demonstrates claimant suffered from pre-existing injuries. Debbie Baker, Angie Baker and Kim Medor credibly testified that prior to September 11, 2008, claimant complained of low back pain as a result of moving furniture at home.

30. Further, claimant testified that in 1994 or 1996, while working for AutoZone claimant slipped and fell on a waxed floor injuring his L4-L5 and sacrum.

31. Medical records dated June 11, 2001 indicate claimant "admits to getting headaches on and off."

32. Medical records dated June 1, 2001 note claimant reports injury to his left wrist.

33. On May 13, 2004 claimant is evaluated for increased bilateral hand pain. Impressions of Dr. Russ, M.D. are that "[t]his could be due to metabolic bone disease or osteopenia related to inflammatory arthritis."

34. Medical records demonstrate that on or around July 23, 2002 claimant complains of "occasional headaches."

35. On October 1, 2002 Dr. Kale Vishakha, M.D. opines claimant's "headaches are most likely due to high BP."

36. Medical records of October 1, 2002 demonstrate claimant has pre-existing complains of low back pain.

37. Medical records of October 8, 2002 note claimant to have "limited motion of ankle."

38. Medical records of November 5, 2002 reports limited range of motion with claimant's ankle.

39. Medical records of June 30, 2003 note claimant has "episodes of dizziness and headaches."

40. Medical records of March 19, 2005 indicate claimant is evaluated for back pain in his lower lumbar spine.

41. Medical records of June 20, 2005 note claimant reports "bad headaches, which he had in the past along with treatment for migraines."

42. Medical records of January 15, 2008 reports "two days ago started feeling pain in his upper back…."

43. On September 11, 2008, after the subject incident, diagnostic testing is performed showing claimant's left wrist is "normal", right wrist is "normal", right ankle is "no fracture", right elbow is "normal" and cervical spine is "[w] ithin normal limits for age."

44. On September 11, 2008 claimant is asked, "other than today, have you seen a physician for any injuries" and claimant indicates "twisted ankle." Yet claimant does not mention his history of back issues, ankle issues, left wrist issue and/or headaches.

45. Further, on September 15, 2008 claimant reports to Rod Tague, OTR and notes "no history of injuries or impairments to the affected area."

46. On September 12, 2008 claimant undergoes a CT of his head. Dr. Lawrence Gaynoe's impressions are "[n] ormal CT of the head."

47. On December 31, 2008 claimant complains to Dr. Danahey "everything still hurts. [Claimant] then acknowledges that overall he is really a lot better…"

48. On January 6, 2009, a MRI of claimant's right ankle is taken at Denver Integrated Imaging. Dr. Joseph Morgan's impression is "[n] o acute structural abnormality

seen at the right ankle. Spurring at the time of the lateral malleolus, consistent with remote injury."

CONCLUSIONS OF LAW

1. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. §8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant, nor in favor of the rights of respondents. C.R.S. §8-43-201.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony in action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See*, *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

3. A workers' compensation case is decided on its merits. C.R.S. §8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions, and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

4. Assessing weight, credibility, and sufficiency of evidence in workers' compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 2001 DJCAR 3781 (Colo.App.2001). It is the ALJ's sole prerogative to evaluate the credibility of the witnesses and the probative value of the evidence. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence.

5. The question of whether claimant has met his burden was one of fact for determination of the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App.2000). Because of the factual nature of that issue, the Industrial Claim Appeals Office must uphold the ALJ's pertinent findings if supported by substantial evidence in the record. C.R.S. §8-43-301(8).

6. Where the ALJ is presented with evidence or testimony that is internally inconsistent or is apparently rebutted by other evidence, it is solely the ALJ's prerogative

to credit all, part, or none of the testimony. *Johnson v. Industrial Claims Appeals Office,* 973 P.2d 624 (Colo.App.1997).

7. Claimant shoulders the burden of proving by a preponderance of the evidence that his alleged injuries arose out of the course and scope of his employment with the employer. C.R.S. §8-41-301(1); *see*, *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. ICAO*, 12 P.3d 844 (Colo. App. 2000). A compensable injury is an injury which "arises out of and "in the course of" employment. C.R.S. §8-41-301; *Price v. Industrial Claims Appeal Office*, 919 P.2d 2007 (Colo.1996). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P2d. 118 (Colo.App.1994).

8. The "in the course" test refers to the time, place and circumstances of the injury. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The question of whether the claimant proved causation by a preponderance of the evidence is a question of fact for resolution by the ALJ. *Faulkner v. ICAO*, *supra*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. C.R.S. §8-43-201. A preponderance of the evidence is that which leaves the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

9. The test is whether the activity of the employee at the time of the injury was solely for the employee's own benefit; where such activity is solely for the employee's benefit, the injury does not arise out of her employment. *Brogger v. Kezer*, 626 P. 2d 700 (Colo. App. 1980). However, an injury while the employee is performing acts for the mutual benefit or advantage of both the employer and the employee is usually compensable. *Deterts v. Times Publishing Co*., 38 Colo. App. 48, 552 P.2d 1033 (1976).

10. The ALJ concludes the claimant's testimony is not credible and not persuasive. The employer's telephone records, as well as testimony from Kim Medor and Angie Baker demonstrate claimant's version of the facts is inconsistent with the evidence. Claimant's testimony that while driving west on I-70 he received a telephone call from either Angie Baker or Kim Medor directing him to travel to Shaw Industries is not credible. Angie Baker and Kim Medor's testimony, as well as the employer's telephone records demonstrates the employer did not call claimant and/or claimant did not call the employer to obtain a directive to travel to Shaw Industries. Further, the evidence shows the employer did not direct claimant to travel to Shawn Industries on September 11, 2008 and claimant was not working on a purchase order at the time of the motor vehicle incident. Claimant was not in the course and scope of employment when he exited off I-70 onto Brighton Blvd. The employer has no vendors in the area of I-70 and Brighton

Blvd., and claimant was not directed to go to Shaw Industries. Claimant's testimony is not credible and persuasive.

11. Claimant's exiting off I-70 onto Brighton Blvd. constituted a deviation from his employment so substantial as to remove it from the employment relationship. Claimant's alleged injuries did not arise out of the course and scope of his employment with the employer.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

DATED: May 6, 2009

Barbara S. Henk
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-770-910

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period October 25, 2008 until terminated by statute.

2. Whether Respondents have established by a preponderance of the evidence that Claimant is precluded from receiving TTD benefits because she was responsible for her termination from employment under §8-42-105(4) C.R.S. and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $502.15.

FINDINGS OF FACT

1. Claimant worked for Employer as a dairy associate. Her duties included organizing merchandise, lifting items and stocking coolers.

2. On February 4, 2008 Claimant suffered admitted industrial injuries to her lower back and hip during the course and scope of her employment with Employer.

3. Employer referred Claimant to Authorized Treating Physician (ATP) Gregory Denzel, D. O. for medical treatment. Claimant visited Dr. Denzel's office for an evaluation on February 12, 2008. She was diagnosed with lumbar and SI strains. Dr. Denzel placed Claimant on modified duty with a restriction of no sitting for more than one hour.

4. On February 22, 2008 Claimant returned to Dr. Denzel for an evaluation. She reported that she was "not improving much." Dr. Denzel imposed additional work restrictions including no repetitive bending and no lifting in excess of 10 pounds.

5. Claimant continued to perform modified job duties for Employer. On May 19, 2008 she again visited Dr. Denzel for an evaluation. He imposed additional work restrictions that included no crawling, kneeling, squatting, climbing, reaching overhead or repetitive motion.

6. On June 23, 2008 Claimant visited Dr. Denzel for another evaluation. He noted that Claimant "has a history of lumbar strain with a MRI showing L5-S1 disk degeneration." Dr. Denzel explained that, despite physical therapy and medications, Claimant's lumbar strain had not improved. He thus referred Claimant to Kenneth Pettine, M.D. for treatment of her uncontrolled pain.

7. On July 11, 2008 Claimant visited Dr. Pettine for an evaluation. He noted that Claimant continued to experience right leg pain as a result of her February 4, 2008 industrial injury. Dr. Pettine remarked that Claimant suffered from radiculopathy, sensory changes and "motor weakness in an L5 and S1 distribution." He recommended epidural steroid injections.

8. On July 11, 2008 Claimant received an "interlaminarepidural steroid injection at L4-5" from Michael H. McCeney, M.D.

9. On July 12-14, 2008 Claimant contacted Employer and explained that she was unable to report to work because of the pain from her epidural injections.

10. On July 14, 2008 Claimant visited Dr. Denzel for an evaluation. Dr. Denzel noted that Claimant had undergone an epidural injection and reported that Claimant had been informed that she would experience pain for two to three days after the injection. Dr. Denzel noted that Claimant was experiencing pain and appeared to be in some distress. He released Claimant to modified duty for the period July 14-18, 2008. Dr. Denzel continued work restrictions that included no reaching overhead, reaching over the body, repetitive motion, crawling, kneeling, squatting or climbing.

11. On July 18, 2008 Claimant returned to Dr. Denzel's office for an evaluation. Claimant reported that, although she received her epidural injection approximately

one week earlier, she was still suffering from pain. Dr. Denzel noted that Claimant was experiencing pain and tenderness in the lumbar region and SI joint.

12. Claimant's employment records reveal that on July 17-18, 2008 she notified Employer that she was unable to report to work.

13. On August 20, 2008 Claimant again contacted Employer and stated that she was unable to report to work. On the following day, Claimant visited Dr. Pettine and reported that she was experiencing severe back pain and radiating leg pain as a result of her industrial injury. Dr. Pettine recommended a discogram in order to identify the source of Claimant's pain.

14. Dr. Denzel referred Claimant to Greg Reichhardt, M.D. for an evaluation. On September 18, 2008 Dr. Reichhardt remarked that Claimant continued to suffer from lower back pain and right leg numbness. He noted that Claimant had undergone a steroid injection without improvement. Dr. Reichhardt also commented that Claimant suffered from possible sacroiliac joint dysfunction and possible discogenic pain. He thus recommended a sacroiliac joint injection with Scott J. Hompland, M.D.

15. On October 24, 2008 Claimant visited Dr. Reichhardt for an evaluation. She reported that "she is doing 100% worse" and continued to experience lower back pain. On the same date, Claimant underwent a right sacroiliac joint injection with Dr. Hompland.

16. On October 25-26, 2008 Claimant informed Employer that she was unable to report to work.

17. On October 27, 2008 Claimant again contacted Employer and explained that she was unable to report to work. Employer responded that Claimant's employment had been terminated effective October 25, 2008. Employer explained that Claimant's termination was based on an excessive number of absences and tardies pursuant to attendance policies.

18. On October 29, 2008 Dr. Hompland drafted a note to Employer on behalf of Claimant. The note provided that Claimant "felt the need to be off work" from October 25-27, 2008 following her epidural injections.

19. Jonnie Schommer, Employer's Personnel Manager, testified about Employer's four-step disciplinary procedure. Ms. Schommer explained that the first step of the procedure involves a verbal "coaching" for a policy infraction. A subsequent policy infraction warrants a written "coaching." In the event of a third violation, an employee receives a "decision day." On a "decision day" the employee is exempt from her regular work shift and is required to draft an "action plan" outlining changes in behavior so that there are no additional policy infractions. If the employee commits a subsequent violation within one year, the final disciplinary level is termination of employment.

20. Ms. Schommer also explained that Claimant received continuing training regarding Employer's attendance policies. She noted that Employer utilized a point system regarding attendance. Pursuant to Employer's point system, three unexcused tardies constitute one unexcused absence. Ms. Schommer remarked that Claimant was aware that, if she accumulated too many "attendance points" based on unexcused absences and tardies, she could be disciplined and terminated.

21. Claimant's employment records reveal that she was disciplined for repeated absences and tardies pursuant to Employer's four-step disciplinary policy. On May 5, 2008 Claimant received a verbal warning based on attendance violations. On June 30, 2008 Claimant received a written warning based on continuing attendance violations. On October 11, 2008 Claimant received a "decision day" because she had accumulated 18 additional absences since June 30, 2008. Ms. Schommer remarked that missing a shift because of a medical appointment does not constitute an unapproved absence or tardy. Claimant was subsequently terminated on October 25, 2008 pursuant to the fourth step of Employer's disciplinary procedure.

22. In connection with Claimant's "decision day" she completed a document entitled "Action Points/Associate's Comments." She stated "I'm gonna do my best to be here when I'm scheduled and my doctors are trying to work with me so I'm not missing work because of my treatments. I only miss work because I have to and I don't want to lose my job." Claimant testified that the "treatments" noted in the document were the epidural steroid injections recommended by Dr. Pettine.

23. Claimant testified at the hearing in this matter. She explained that some of the work she missed subsequent to her February 4, 2008 industrial injury occurred because she was experiencing pain. Claimant commented that, following her epidural steroid injections she suffered increased pain for two to three days. She credibly noted that she contacted Employer on each of the days that her pain prevented her from reporting to work.

24. Claimant has demonstrated that it is more probably true than not that she is entitled to receive TTD benefits from October 25, 2008 until terminated by statute. Claimant's treating physicians imposed work restrictions that began shortly after her industrial injury and continued through her date of termination. Claimant's work restrictions included no reaching overhead, reaching over the body, repetitive motion, crawling, kneeling, squatting or climbing. The restrictions thus impaired her ability to effectively and properly perform her regular employment.

25. Respondents have failed to establish that it is more probably true than not that Claimant was responsible for her termination from employment. Respondents have not established that Claimant committed a volitional act or exercised some control over the circumstances of her termination. Although Claimant missed several scheduled work shifts between February 4, 2008 and October 25, 2008, the pain associated with her admitted lower back injury caused many of the absences. Claimant credibly explained that, following her epidural steroid injections, she experienced increased pain for two to three days. Claimant's "Action Points/Associate's Comments" completed on

her “decision day” also reflects that she was unable to report to work because of her epidural steroid injections. Moreover, the medical records documenting Claimant’s pain levels subsequent to her epidural injections are consistent with her testimony. Although some of Claimant’s absences were related to non-work-related medical conditions or personal matters, Claimant was generally terminated for excessive absenteeism. It is thus unclear whether the reasons for Claimant’s termination included medical appointments and pain that were related to her industrial injury. Because the effects of Claimant’s industrial injuries prevented her from performing her assigned duties and contributed to her termination, Respondents have failed to establish that Claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances.

CONCLUSIONS OF LAW

The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To obtain TTD benefits, a claimant must establish a causal connection between a work-related injury and a subsequent wage loss. §8-42-103(1)(a), C.R.S. To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term “disability,” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume

her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when she has a complete inability to work or there are restrictions that impair her ability to effectively and properly perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

5. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive TTD benefits from October 25, 2008 until terminated by statute. Claimant's treating physicians imposed work restrictions that began shortly after her industrial injury and continued through her date of termination. Claimant's work restrictions included no reaching overhead, reaching over the body, repetitive motion, crawling, kneeling, squatting or climbing. The restrictions thus impaired her ability to effectively and properly perform her regular employment.

6. Nevertheless, Respondents assert that Claimant is precluded from receiving TTD benefits subsequent to April 15, 2007 because she was responsible for her termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes"). Under the termination statutes a claimant who is responsible for her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and the wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006); *see Anderson,* 102 P.3d at 330. The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, Respondents must demonstrate by a preponderance of the evidence that she committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994).

7. As found, Respondents have failed to establish by a preponderance of the evidence that Claimant was responsible for her termination from employment. Respondents have not established that Claimant committed a volitional act or exercised some control over the circumstances of her termination. Although Claimant missed several scheduled work shifts between February 4, 2008 and October 25, 2008, the pain associated with her admitted lower back injury caused many of the absences. Claimant credibly explained that, following her epidural steroid injections, she experienced increased pain for two to three days. Claimant's "Action Points/Associate's Comments" completed on her "decision day" also reflects that she was unable to report to work because of her epidural steroid injections. Moreover, the medical records documenting Claimant's pain levels subsequent to her epidural injections are consistent with her testimony. Although some of Claimant's absences were related to non-work-related medical conditions or personal matters, Claimant was generally terminated for excessive absenteeism. It is thus unclear whether the reasons for Claimant's termination included

medical appointments and pain that were related to her industrial injury. Because the effects of Claimant's industrial injuries prevented her from performing her assigned duties and contributed to her termination, Respondents have failed to establish that Claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant shall receive TTD benefits for the period October 25, 2008 until terminated by statute.

2. All issues not resolved in this Order are reserved for future determination.

DATED: May 6, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-773-710

ISSUES

Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable injury on September 16, 2008.

Whether Claimant is entitled to payment of medical expenses for treatment of her alleged bilateral upper extremity injuries.

At hearing, the parties stipulated that if compensable, Claimant's Average Weekly Wage was $627.00. Also at hearing, Claimant withdrew the issues of temporary total or temporary partial disability, without prejudice.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. Claimant worked as a bus driver for Employer. Employer is in the business of assisting senior citizens with daytime services, medical care, and transportation to medical and other appointments. Employer refers to these senior citizens as 'participants'.

2. Claimant testified that on September 16, 2008, she was assisting an elderly participant, Larry Lucero, out of her bus when the bus started rolling backward. The bus was parked in front of the employer's building and was on level ground. Claimant testified that she took Lucero's walker from its storage spot at the front of the bus, walked down the stairs, and set the walker up. Mr. Lucero was frail and needed his walker. As she turned to return to the bus, Mr. Lucero was walking down the stairs. Because Mr. Lucero had been getting progressively 'more wobily', as Claimant stated in her First Report of Injury to the Employer (Exhibit Q), Claimant was watching him come down the stairs of the bus.

3. Claimant testified that as Mr. Lucero was coming down the stairs of the bus she saw the wheels of the bus move backward in her peripheral vision. She testified that she saw a mud spot on the front tire of the bus move about one-half revolution, from the bottom of the tire to the top. Participant Lucero was on the stairs when Claimant claims she noticed the bus moving. Claimant then turned her body and was then standing facing toward the front of the bus, with her feet on the ground and Mr. Lucero standing on the ground between her arms. Claimant's testimony in this regard conflicts with the statement given by Claimant to an investigator on October 22, 2008 (Exhibit 6) when Claimant stated she was turned sideways with her right shoulder toward the bus that would have placed Claimant facing the back, not the front of the bus. At this time, both Claimant and Mr. Lucero were standing in the space between the bus doors. According the Claimant, these events all occurred within "nanoseconds".

4. The doors of the bus driven by Claimant on the day of the alleged injury are folding glass doors as depicted in Exhibit J. As Claimant was helping Mr. Lucero off the stairs of the bus she had one foot on the first step of the bus. In this position, the ALJ finds that Claimant's vision of the front tire of the bus would be obscured by the doors of the bus and also by a cowling around the doors that protrudes from the body of the bus around the door opening. Additionally, Claimant's primary attention was focused on assisting Mr. Lucero down the stairs of the bus because of his frail and "wobily" condition. The ALJ finds Claimant's testimony that she noticed a mud spot on the front tire of the bus move from the bottom to the top to be improbable and not credible.

5. Claimant testified that after she initially stopped the bus, she was holding the bus still with both hands against the door and Lucero between her arms. She testified that she removed one hand to use the phone that hung around her neck to call for help. She testified that when she removed that hand, the bus moved again. Claimant testified that she quickly placed her second hand back on the door and stopped the backwards movement of the bus. Claimant testified that she sustained bilateral upper extremity and shoulder pain as a result of these efforts to stop the bus from moving or rolling on September 16, 2008.

6. Claimant testified that the bus began rolling because it jumped out of park and because the emergency brake was defective. Claimant testified that she had com-

plained in the past to Employer about these types of defects with the particular bus she was driving on the day of injury.

7. Jesse Sanchez is a lead driver for Employer and part of his job to assist drivers in unloading participants, and that he approached claimant as he normally would on September 16, 2008 to assist her in unloading her passengers after she had parked in front of the building. When Mr. Sanchez arrived, claimant's arms were not in front of her holding the door of the bus to keep it from moving. The alarm was not sounding on the bus as it usually would if it was moving backward. Claimant told Mr. Sanchez when he arrived that the bus had slipped out of park. Mr. Sanchez went to the driver's side of the bus and checked the bus and when he checked the gearshift, he found that the bus was actually in park although he did find the usual "play" of the gearshift within the park setting. The parking brake was on. Mr. Sanchez' testimony is credible and persuasive.

8. Kathy Thibeault was claimant's acting supervisor on September 16, 2008. On that day, Claimant came to her office, and reported that the parking brake on the bus she was driving didn't work or that the bus had jumped out of gear and had rolled as a result. Thiebeault called her supervisor, and was told to check out the bus herself to determine if there was a problem. Thibeault then drove the bus from the facility, accompanied by claimant, for the remainder of claimant's scheduled route that morning. Teibault tried to duplicate the equipment failure described by claimant a number of times, and could not do so. Claimant did not report to Ms. Thiebeault that she had been physically injured during the reported incident during any of their discussions on September 16, 2008. Ms. Thibeault's testimony is credible.

9. The ALJ finds Claimant's testimony that the bus she was driving on September 16, 2008 rolled or began moving after she parked it in front of Employer's building and that she sustained bilateral upper extremity and shoulder injuries because she had to use her hands to push against the bus to keep it from moving to be improbable and not credible. Claimant's statements regarding her position at the time she allegedly noticed the bus moving are conflicting, as found above. The bus was parked on level ground. It was found to be in park with the brake on by Mr. Sanchez. Ms. Thibeault could not replicate Claimant's complaint that the bus would jump out of park or that the parking brake did not work. The ALJ finds the testimony of Mr. Sanchez and Ms. Thibeault regarding the presence of any mechanical malfunctions with the bus being driven by Claimant to be more credible and persuasive than Claimant's testimony. The ALJ finds that the bus did not move or roll on September 16, 2008 as alleged by Claimant.

10. Claimant sustained an injury to her right wrist in February 2008 when she was in an altercation with her nephew. Claimant obtained treatment for this injury at Kaiser and was placed on work restrictions that remained in place at the time of Claimant's alleged September 16, 2008 injury with Employer. Additionally, Claimant has a history of a hand injury 2 ½ years ago that resulted in chronic right hand weakness.

11. Claimant reported her injury to Bob Holt at Employer on September 16, 2008 and Claimant filled out a First Report of Injury on September 17, 2008. At that time, Mr. Holt referred Claimant to Exempla Green Mountain Medical Center where Claimant was seen on September 17, 2008 by Physicians Assistant Porter.

12. Physicians Assistant Porter found on physical examination on September 17, 2008 that Claimant had decreased range of motion due to pain at both wrists with no swelling, ecchymosis, erythema or warmth of either hand, wrist or forearm. Physicians Assistant Porter questioned the causality and the relationship between Claimant's previous injuries and her current condition and made a referral for a physiatry consultation on the issue of causality.

13. Claimant was seen by Dr. Suzanne Beck, D.O. on September 18, 2008. Dr. Beck also questioned causality. Dr. Beck did not place any new restrictions on Claimant as a result of the alleged injury of September 16, 2008 and allowed Claimant to remain under the restrictions previously given by her personal physicians at Kaiser.

14. Claimant was evaluated by Dr. John Sacha, M.D. on September 24, 2008. Dr. Sacha is a physician who participates in teaching the Division of Workers' Compensation's Level II accreditation course for physicians, including the section on assessment of causality. Dr. Sacha performed a physical examination of Claimant and following this examination found significant issues with causality of Claimant's alleged symptoms that Dr. Sacha assessed as wrist pain and myofascial pain with nonphysiologic presentation with multiple areas of pain complaints. Dr. Sacha referred Claimant for an EMG to further assess her complaints prior to making a final determination on causality. The EMG was done on October 2, 2008 and showed borderline findings for left median neuropathy at the left wrist consistent with mild carpal tunnel syndrome. No other abnormalities were found on the EMG.

15. Dr. Sacha testified at hearing, and it is found, that Claimant did not sustain an injury on September 16, 2008 even if it were found that the bus rolled or moved on that date and that Claimant braced or pushed against the bus with her hands. Dr. Sacha credibly testified that such an iso-kinetic movement would not cause either carpal tunnel syndrome or a bilateral upper extremity injury as complained of by Claimant. Dr. Sacha found no objective pathology to explain Claimant's symptoms and noted her to have a non-physiologic examination.

16. The ALJ finds that Claimant has failed to sustain her burden of proof by a preponderance of the evidence that she sustained a compensable injury to her bilateral upper extremities and shoulders on September 16, 2008 as a result of attempting to keep the bus from which she was unloading participants in the course of the work for Employer from moving.

CONCLUSIONS OF LAW

17. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2007), is to assure the quick and efficient delivery of disability and

medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that his injury arose out of the course and scope of his employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

18. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether another witness or thing has contradicted the testimony of a witness; and bias, prejudice, or interest. See Prudential Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

19. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

20. The Act distinguishes between the terms "accident" and "injury." The term "accident" refers to an unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), *supra*. By contrast, an "injury" refers to the physical trauma caused by the accident. Thus, an "accident" is the cause and an "injury" the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romine v. Air Wisconsin Airlines* W. C. No. 4-609-531 (October 12, 2006). A "compensable" industrial accident is one which results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). The question of whether the claimant has proven a compensable injury is one of fact for resolution by the ALJ. C.R.S. § 8-43- 30 1(8); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

21. The term "injury" in C.R.S. §8-40-201(2) includes disability resulting from accident or occupational disease. "Injury" has been construed to mean a compensable injury. *See City of Boulder v. Payne*, 426 P.2d 194, 197 (Colo. 1967); *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d 504, 506 (Colo. App. 2004).

22. As found, the Claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury on September 16, 2008 while employed by Employer. Claimant's testimony that the bus she was driving jumped out of park, moved or rolled causing her to have to stop it with her hands and thereby causing her

injury is not credible. Claimant's testimony is rebutted by the more credible and persuasive testimony of Mr. Sanchez and Ms. Thibeault and by the inconsistencies in Claimant's own versions of the incident from which she claims injury. In addition and as found, even if it were found that the bus rolled as alleged by Claimant, Claimant did not sustained any injury as a result. Claimant has pre-existing right wrist injuries and was under work restrictions at the time of the alleged injury. Claimant did not require any further medical treatment or suffered any disability from her right wrist condition that was not already present before September 16, 2008. Claimant's testimony that she sustained injury to both of her upper extremities and shoulder is rebutted by her nonphysiologic medical examination with Dr. Sacha. The ALJ finds and concludes that the credible testimony of Dr. Sacha establishes that Claimant did not require any medical treatment or have any need for work restrictions as a result of any incident on September 16, 2008. Claimant has failed to prove that she sustained a compensable injury defined by law as one requiring medical treatment or causing a disability.

ORDER

It is therefore ordered that:

Claimant's claim for compensation and medical benefits for a September 16, 2008 injury is denied and dismissed.

Any and all claims for medical benefits for treatment at Kaiser or at Exempla Green Mountain Medical Center are accordingly, denied and dismissed.

DATED: May 6, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-775-934

ISSUE

The issue to be determined by this decision is Change of Physician.

FINDINGS OF FACT

Based on the evidence presented at hearing & the stipulations of the parties, the ALJ makes the following Findings of Fact:

1. Claimant reported his injury on September 29, 2008.

2. Claimant was instructed by his supervisors, Leo Alvarez and Jim Cross to go to Concentra for medical treatment.

3. Claimant did not receive a list of providers as required under C.R.S. §8-43-404(5)(a)(I)(A).

4. Claimant filed a Notice of One-Time Change of Physician Form on December 18, 2008. The claimant requested a change of physician to Dr. Yamamoto in writing on the form provided by the Division of Worker's Compensation.

5. Respondents stipulated that claimant had filed the Change of Physician form and that they had not responded or denied the request within 20 days.

CONCLUSIONS OF LAW

1. Claimant is entitled to a change of physician pursuant to C.R.S. 8-43-404(5)(a)(VI).

2. Claimant sent Respondent Insurer and Respondent's attorney a Notice of One Time Change of Physician dated December 18, 2008 requesting authorization for Dr. David Yamamoto to treat claimant.

3. Respondents failed to grant or refuse Claimant's request for a change of physician within twenty days, as required under C.R.S. 8-43-404(5)(a)(VI), and therefore waived any objection to Claimant's request.

4. Section 8-43-404(5) does not specify a particular form for the insurer to grant or approve permission for a change of physician. *Williams v. Job Search, I.C.A.O., W.C. No. 4-371-530, October 25, 1999.* Neither is there a specific form for the claimant to request a change of physician.

ORDER

It is therefore ordered that:

1. Claimant's request for a change of physician to Dr. Yamamoto is granted.

2. All matters not determined herein are reserved for future determination.

DATED: May 6, 2009

Barbara S. Henk
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-724-201

ISSUES

The issues determined herein are petition to reopen and penalties against claimant.

FINDINGS OF FACT

1. Claimant worked for the employer in direct care of youth.

2. On February 2, 2006, claimant suffered an admitted industrial injury. She was playing basketball with some of the youth at the employer's facility when one of the youth hit her planted left leg from the outside causing a pop in the medial aspect of her knee.

3. On February 3, 2006, Nurse Practitioner Doug Miller examined claimant, who reported that she was having pain with walking. N.P. Miller diagnosed left knee sprain, prescribed Naprosyn, and imposed temporary work restrictions.

4. On February 10, 2006, Dr. Myrlen Chesnut examined claimant, who reported that her knee was improved. She reported experiencing a periodic clicking in her knee. Dr. Chesnut noted that claimant's obesity made it difficult to tell if there was any effusion in her knee. She had some pain with full flexion or extension of the knee. Dr. Chesnut did not detect any grating. He continued claimant on her modified duty.

5. On February 23, 2006, claimant returned to see Dr. Chesnut. Claimant reported that her knee had improved. She continued to have pain and occasional swelling. She claimed that her knee would sometimes "pop." Dr. Chesnut noted that this was new since the injury. On examination, Dr. Chesnut noted that claimant had a tiny bit of grating, although it was very minimal. He did not hear an audible click. He continued claimant on modified duty.

6. Claimant returned to see Dr. Chesnut on March 13, 2006. Claimant reported that her knee still popped occasionally, resulting in pain for about 24 hours. She felt that sometimes she had fluid on the knee. Dr. Chesnut noted a little bit of grating, but he did not detect any kind of pop. He did not believe there was any kind of ligament damage, but indicated that she might have a cartilage tear. He referred claimant for a magnetic resonance image ("MRI").

7. The March 17, 2006 MRI showed chondromalacia of the lateral facette of the patella and of the underlying articular cartilage in the anterior lateral femoral condyle. It also showed mild early spurring of the femoral and tibial condyles, which likely represented early osteoarthritis related to obesity. There was myxoid degeneration of the

substance of the mid portion of the medial meniscus. There was no tear of the medical meniscus, however, and the lateral meniscus was intact. The anterior and posterior cruciate ligaments were intact as well. Overall, there appeared to be early degenerative changes of the knee joint proper and the medial meniscus.

8. On March 21, 2006, Dr. Chesnut reexamined claimant, who reported that she was not having pain at that time. She occasionally had a little bit of an ache and would suffer pain when the knee popped. Dr. Chesnut reviewed claimant's MRI and noted that she did have some chondromalacia of the patella on the lateral aspect. He noted that there might be little bit of degeneration of the medial meniscus, but it was probably secondary to claimant's weight. He indicated that claimant's exam was essentially negative that day. She was continued on her modified duty.

9. Claimant returned to see Dr. Chesnut on April 4, 2006. Claimant reported that her knee still popped, causing pain. She reported that she was doing much better and felt like she was at maximum medical improvement ("MMI"). Dr. Chesnut noted that claimant ambulated without difficulty and that her exam was no different from what it had been in the past. He placed claimant at MMI without any permanent impairment or permanent work restrictions.

10. Claimant testified that her knee pain continued periodically after she was placed at MMI, although there was no specific point when it became "worse". She claimed it would randomly "go out," although she clarified that it only felt as if it would "go out." She stated that it would pop and catch, causing her immediate pain that would go away after a minute. Claimant admitted that she was told by her doctor that the continued clicking and popping was due to her weight and not due to her February 2006 injury. Claimant admitted that she never sought treatment for this alleged continued pain after MMI.

11. On April 20, 2006, claimant was seen by her personal physician, Dr. Richard Rivera. At this appointment, claimant made no complaints of knee pain or knee problems.

12. On September 19, 2006, claimant returned to see Dr. Rivera. At that time, she complained of a two-week history of left heel pain. She did not report complaints of left knee pain or problems.

13. Claimant testified that in September of 2006 she voluntarily resigned her employment with the employer. Since that time, she has worked for several other employers. Claimant admitted that her position with her other employer, the Colorado State Hospital, involved a lot of walking.

14. On March 31, 2007, claimant was at a friend's house, walking across the kitchen floor when her knee actually gave out. Claimant felt immediate excruciating pain that would not go away. She indicated that her knee immediately swelled up.

15. Claimant testified that she went to her personal physician's office on April 1, 2007; however, there are no medical records of this visit.

16. Claimant was seen by Dr. Rivera on April 9, 2007, in follow-up to a left knee injury. The report indicated that claimant had been in an immobilizing cast since her last visit on March 31, 2007. Claimant reported that she was feeling better, but that her knee hurt and swell if she was on it for more than 45 minutes. She noted that it hurt to bend or straighten the knee. The report indicated that she worked at the Colorado State Hospital and did a lot of walking for that job. Claimant was released to light duty.

17. On May 10, 2007, Dr. Drew Ritter examined claimant, who reported that she initially injured her knee at work in 2006. She stated that she was treated with rest and nonsteroidal medications. She indicated that an MRI was done, which showed normal wear and tear. She reported that the pain slowly got better, but she had popping occasionally. She indicated that on March 30, 2007, she was walking when it gave out and popped. She reported that since then it was hard to get the pain to go away. She said that usually it would go away after a few days. On examination, Dr. Ritter noted that claimant's left knee had grade I effusion. She had mild patellofemoral crepitus, but not a lot of tenderness. She was very tender on the medial joint line. He noted that claimant's anterior cruciate ligament showed significant laxity. Dr. Ritter opined that claimant had significant internal derangement. He thought she had a torn anterior cruciate ligament and that it was likely caused at the time of her injury at work. He did not know if the meniscus was torn, but felt that the anterior cruciate ligament laxity could have caused it to tear since then. Dr. Ritter did not, however, review claimant's MRI from March 17, 2006. He recommended a repeat MRI at that time.

18. Claimant underwent another MRI of her left knee on May 21, 2007. The MRI showed a subtotal to complete tear of the proximal portion of the anterior cruciate ligament. It also showed a complex, possibly bucket-handle, tear of the medial meniscus, predominantly involving the posterior horn with a portion of the posterior horn seen in the anterior medial compartment.

19. Claimant returned to see Dr. Ritter on May 22, 2007. Dr. Ritter reviewed claimant's MRI and noted that claimant had a partial and possible complete anterior cruciate ligament tear as well as a complex posterior medial meniscal tear. Dr. Ritter recommended an arthroscopy with anterior cruciate ligament reconstruction.

20. On June 7, 2007, the insurer filed a final admission of liability terminating benefits as of MMI on April 4, 2006, and denying permanent disability benefits. Claimant did not object to the final admission.

21. On June 25, 2008, claimant filed a petition to reopen based upon a change of condition. Claimant did not, however, attach any supporting documentation to her petition, noting only that she was unable to pay for a medical examination/report.

22. On September 4, 2008, respondents sent claimant interrogatories. Claimant's answers were due on September 24, 2008. In their interrogatories, respondents requested information regarding the basis of claimant's petition to reopen and claim that her condition had worsened. Respondents also requested information regarding claimant's medical history. Claimant did not provide answers to the interrogatories.

23. On October 8, 2008, respondents filed a motion to compel claimant's answers to interrogatories and extend the hearing date. Claimant's attorney indicated that claimant had no objection to the motion and the motion was filed as unopposed. The motion was granted by the undersigned on October 8, 2008. Claimant was ordered to produce her answers to respondents' interrogatories within 10 days of the date the order was signed, or by October 18, 2008. Because October 18 was a Saturday, the answers were due by October 20, 2008.

24. Claimant did not provide her responses to interrogatories until November 11, 2008, or 24 days after they were due pursuant to the order. In her testimony, claimant provided no explanation for the delay in providing her answers to interrogatories.

25. On November 17, 2008, John Raschbacher, M.D., performed an independent medical examination for respondents. Claimant reported to Dr. Raschbacher that she initially injured her left knee on February 2, 2006, at work. She indicated that, after she was discharged by Dr. Chesnut, she had some swelling, aching, catching and popping sensations. She reported that the knee did not give out, although it sometimes felt like it might. She claimed this went on for several months and then she was seen by her primary car physician in March of 2007. She also described an incident in March of 2007 when she was at a friend's house in the kitchen. She stated that she was walking across the kitchen floor when her knee gave out. She claimed there was no particular trauma that caused the giving way episode. After examining claimant and reviewing her medical records, Dr. Raschbacher opined that it was clear that claimant has both an anterior cruciate ligament tear and a medial meniscus tear and that the appropriate treatment for these would be surgery. He concluded, however, that the medical records clearly documented that this treatment and intervention should be done on a non-work-related basis. He indicated that claimant's initial injury in 2006 resolved according to the medical documentation. He also noted that the MRI done in March of 2006 did not show a meniscal tear or an anterior cruciate ligament tear. That MRI showed only degeneration. Claimant had a subsequent non-work-related episode in 2007 that caused her knee to give way and likely caused the tears in claimant's knee. Dr. Raschbacher noted that the bookend MRIs document the non-work-relatedness of claimant's current condition and the progression of her underlying and pre-existing disease.

26. Dr. Raschbacher testified by deposition that claimant's current condition was not related to her February 2, 2006 work injury. He noted that claimant's March 2006 MRI showed chondromalacia in the knee, specifically at the patella, some fluid in the knee, and some early degenerative changes. He indicated that chondromalacia was degeneration of the cartilage and was very common. He noted that there were no tears in claimant's meniscus or in her cruciate ligaments. The MRI report did show, however,

that claimant had signs of early osteoarthritis related to obesity. Dr. Raschbacher testified that the degeneration shown in claimant's MRI was not caused by her injury in February 2006. Instead, it was an underlying, pre-existing condition.

27. Dr. Raschbacher noted that after claimant was placed at MMI by Dr. Chesnut, there was no mention in her medical records of any knee problems, pain or symptomatology. Dr. Raschbacher indicated that, based on claimant's underlying chondromalacia, she could have developed a give-way type of condition with or without her injury in February of 2006. He also indicated that a give-way episode like the one that occurred in March of 2007 could have occurred if she had further degeneration in the meniscus on the basis of her underlying, pre-existing disease. Or, the give way could have occurred from a combination of the degeneration and her chondromalacia.

28. Dr. Raschbacher testified that based on the differences in claimant's two MRIs she clearly had a change in her condition. He concluded, however, that claimant's current condition was not related to her February 2, 2006, work injury. He concluded that they were caused by a new acute event. In claimant's case, her current condition was caused by a separate and distinct incident, namely the episode that occurred in March of 2007. In his opinion, the giving way episode that occurred in March of 2007 caused the bucket handle tear in claimant's meniscus, as well as the anterior cruciate ligament tear. Dr. Raschbacher testified that he disagreed with Dr. Ritter's statement in his May 10, 2007 report that claimant's torn ligament was caused at the time of her injury in February of 2006. In his opinion, the MRI performed in March of 2006 clearly refuted Dr. Ritter's opinion. In Dr. Raschbacher's opinion, given the bookend MRI reports, claimant's current condition was more likely than not related to the March 2007 episode rather than to her February 2006 work injury. Overall, Dr. Raschbacher's opinion was that claimant's current condition was not caused by a worsening of her February 2006 work injury.

29. Claimant has failed to prove by a preponderance of the evidence that she suffered a change of condition as a natural consequence of the admitted February 2, 2006, work injury. The 2006 MRI showed chondromalacia of the patella and degenerative changes of the medial meniscus, but no anterior cruciate ligament tear or bucket handle tear of the medial meniscus. Claimant testified that, after MMI, her knee would sporadically "go out." She also testified that her knee never actually gave out and it just felt as if it would do so. Claimant suffered a new accidental injury on March 31, 2007, when she started to walk in her friend's kitchen, suffered a pop, and experienced excruciating pain that never resolved. Dr. Raschbacher's opinions are persuasive that claimant suffered a new injury that was not due to her work injury.

30. The preponderance of the evidence demonstrates that claimant violated the October 8, 2008, order compelling claimant's answers to respondents' interrogatories by October 20. She did not provide the answers until November 11, 2008. Claimant provided no reasonable excuse for her delay

in answering the interrogatories. Claimant is correct that respondents have not demonstrated any significant harm due to the delay.

CONCLUSIONS OF LAW

1. Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. *See Ward v. Ward*, 928 P.2d 739 (Colo. App. 1996) (noting that change in condition has been construed to mean a change in the physical condition of an injured worker). Claimant must prove that her change of condition is the natural and proximate consequence of the industrial injury, without any contribution from another separate causative factor. *Vega v. City of Colorado Springs,* W.C. No. 3-986-865 & 4-226-005 (ICAO, March 8, 2000). As found, claimant has failed to prove by a preponderance of the evidence that she suffered a change of condition as a natural consequence of the admitted February 2, 2006, work injury.

2. Respondents seek a penalty against claimant pursuant to section 8-43-304(1), C.R.S. Respondents must first prove that the disputed conduct constituted a violation of statute, rule, or order. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995); *Villa v. Wayne Gomez Demolition & Excavating, Inc.*, W.C. No. 4-236-951 (ICAO, January 7, 1997). Second, if claimant committed a violation, penalties may be imposed only if claimant's actions were not reasonable under an objective standard. *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals* Office, 114 P.3d 97 (Colo. App. 2005); *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003); *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). The standard is an objective standard measured by the reasonableness of claimant's action and does not require knowledge that the conduct was unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676, (Colo.App., 1995). As found, claimant violated the October 8, 2008, order compelling claimant's answers to respondents' interrogatories by October 20. She provided the answers only on November 11, 2008. Pursuant to section 8-43-305, C.R.S., each day's violation is a separate violation.

3. Section 8-43-304, C.R.S. requires imposition of a penalty of at least one cent per day for claimant's unreasonable violation of the order between October 20 and November 11, 2008. *Marple v. Saint Joseph Hospital*, W.C. No. 3-966-344 (Industrial Claim Appeals Office, September 15, 1995)(decided under predecessor section 8-53-116). All of the circumstances must be considered in determining the amount. The amount of the penalty should be sufficient to dissuade a violator from future violations, but should not be constitutionally excessive or grossly disproportionate to the violation found. The ALJ should consider the reprehensibility

of the conduct involved, the harm to the non-violating party and the difference between the amount of the penalty and civil damages that could be imposed in comparable cases. *Associated Business Products v. Industrial Claim Appeals Office,* 126 P.3d 323 (Colo.App. 2005). The Judge concludes that claimant should be penalized in the amount of $5 per day for the period October 20 through November 11, 2008.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen is denied and dismissed.

2. Pursuant to section 8-43-304(1), C.R.S., claimant shall pay a penalty in the amount of $5 per day for the period October 20 through November 11, 2008. Claimant shall pay 75% of the penalty to the insurer as the aggrieved party and 25% of the penalty to the Subsequent Injury Fund. Claimant shall pay the Director of the Division of Workers' Compensation on behalf of the Subsequent Injury Fund as follows: Claimant shall issue a check payable to "Subsequent Injury Fund" and shall mail the check to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Brenda Carrillo, Subsequent Injury Fund.

DATED: May 7, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-745-805

ISSUES

The sole issue determined herein is whether claimant is at maximum medical improvement ("MMI").

FINDINGS OF FACT

1. On September 27, 2007, claimant suffered an admitted industrial injury to her right ankle.

2. Dr. Peterson was the primary authorized treating physician for the work injury.

3. A November 15, 2007, magnetic resonance image ("MRI") showed a fracture of the calcaneal anterior process.

4. On November 26, 2007, Dr. Jinkins examined claimant and diagnosed a fracture as well as peroneal tendonitis. He administered a cortisone injection to the tendon. Claimant experienced good, but not complete, relief of symptoms.

5. Dr. Peterson referred claimant to Dr. Shank. On January 16, 2008, Dr. Shank administered a subtalar steroid injection.

6. Claimant experienced temporary relief of her symptoms from the injection. After only a few days, her pain returned. Thereafter, she experienced good and bad days.

7. On January 22, 2008, Dr. Peterson reexamined claimant and noted that she was angry. Dr. Peterson was concerned that claimant was magnifying her symptoms. He referred her for psychological treatment by Dr. Kaplan.

8. On February 19, 2008, Dr. Peterson reexamined claimant, who reported that she had controlled her anger without need for treatment by Dr. Kaplan. She also reported minimal pain. Dr. Peterson determined that claimant was at MMI without permanent impairment.

9. On June 24, 2008, Dr. Shank reexamined claimant, who reported doing well, with significant improvement and only mild aching. Dr. Shank diagnosed resolving synovitis and noted that claimant was progressing toward MMI.

10. On August 12, 2008, claimant returned to Dr. Shank and reported waxing and waning pain, including cuboid pain, peroneal pain, sinus tarsi pain, and anterior process calcaneus pain. Dr. Shank noted that claimant had sustained a recent fall with some worsening of pain over the region. Dr. Shank diagnosed persistent pain and a new injury. He recommended a repeat MRI, which was not obtained.

11. In October 8, 2008, claimant wrote to Dr. Shank to memorialize her phone call to Dr. Shank on August 19, 2008. Claimant wrote that she had not suffered a new injury and she requested that Dr. Shank correct his medical record.

12. On October 30, 2008, Dr. Polanco performed a Division Independent Medical Examination ("DIME"). He diagnosed post anterior process calcaneus fracture with residual pain. Dr. Polanco determined that claimant was not at MMI and required further diagnostic care and active medical treatment, including likely surgical procedure.

13. On March 4, 2009, Dr. Ridings performed an IME for respondents. Claimant reported that the January 2008 injection by Dr. Shank provided 50% pain relief for one week and then claimant returned to the same pain level. Claimant denied any new injury. Claimant reported that her ankle snapped while she was walking in September

or October 2008, resulting in increased pain. Dr. Ridings concluded that claimant was at MMI on February 19, 2008. He concluded that claimant suffered a new injury before the August 12, 2008, reexamination by Dr. Shank.

14. Dr. Ridings testified at hearing consistent with his report. He thought it was highly probable that the DIME was incorrect, if one accepted the accuracy of Dr. Shank's August 12 report. Dr. Ridings admitted that steroid injections work only for approximately two weeks and then the medication effect is gone. He agreed that a fracture can ache for up to one year after the fracture "heals." He agreed that claimant needed a repeat MRI, although he did not think that it was due to the work injury.

15. Respondents have failed to prove by clear and convincing evidence that the DIME incorrectly determined that claimant was not at MMI. The record evidence demonstrates some concern that claimant provided an inaccurate history to Dr. Polanco. Claimant likely experienced at least some improvement after the January 2008 subtalar injection or Dr. Peterson was unlikely to determine MMI. Nevertheless, in June 2008, Dr. Shank only thought that claimant was progressing toward MMI. Dr. Shank is unlikely to make up completely a history of a new fall before the August 2008 examination in which he recommended another MRI. Nevertheless, the judge cannot find that it is highly probable or free from serious or substantial doubt that Dr. Polanco's determination is wrong. The MMI determination is a medical decision. Indeed, the MRI might help disclose whether claimant has a change in her condition or even a new injury.

CONCLUSIONS OF LAW

1. Section 8-42-107(8)(b)(III), C.R.S., provides that the determination of the DIME with regard to MMI shall only be overcome by clear and convincing evidence. A fact or proposition has been proved by "clear and convincing evidence" if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). In this case, the DIME, Dr. Polanco, determined that claimant was not at MMI. Consequently, respondents must prove by clear and convincing evidence that this determination is incorrect.

2. "Maximum medical improvement" is defined in Section 8-40-201(11.5), C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

Reasonable and necessary treatment and diagnostic procedures are a prerequisite to MMI. MMI is largely a medical determination heavily dependent on the opinions of medical experts. *Villela v. Excel Corporation*, W.C. Nos. 4-400-281, 4-410-547, 4-410-548, & 4-410-551 (Industrial Claim Appeals Office, February 1, 2001). As found, respondents have failed to prove by clear and convincing evidence that the DIME incorrectly determined that claimant was not at MMI.

3. Because claimant is not yet at MMI, PPD is not yet ripe for determination.

ORDER

It is therefore ordered that:

1. No specific medical benefit was requested and none is ordered herein. All matters not determined herein are reserved for future determination.

DATED: May 7, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-728-134

ISSUES

¬ Did the claimant prove by a preponderance of the evidence that he sustained functional impairment beyond the leg at the hip so as to entitle him to a whole person impairment rating?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

The claimant is an employee of the employer's gas consulting business. On June 18, 2007, the claimant was assigned to inspect residential gas line connections and meters in order to detect leaks. The claimant also checked meters for rust and corrosion. This job required the claimant to walk from house to house covering as much as 12 miles per day.

On June 18, 2007, while attempting to inspect a gas meter, the claimant stepped in a window well that was partially concealed under some lawn trimmings. The claimant fell and injured his left foot.

The employer took the claimant to Concentra on June 18, 2007, where he came under the care of Dr. Andrew Plotkin, M.D. X-rays were performed and the claimant was diagnosed with fractures of the third and fourth metatarsals. The claimant was given a boot and crutches and he was directed not to bear weight on the foot. The claimant was also prescribed Vicodin and referred to an orthopedic specialist for examination and treatment.

The respondents admitted liability for the claimant's injury. The employer permitted the claimant to return to work where he performed light duty answering phone calls.

The claimant testified that he remained in a no weight bearing status for approximately 10 days. Thereafter he was taken off the crutches and began to place weight on the foot. According to the claimant weight bearing caused pain and he developed an abnormal gait. He also began to experience low back pain that would occasionally extend to the upper back. The claimant stated that the amount of pain depends on the amount of walking he does. The claimant recalled that he reported the back pain to his physicians approximately three weeks after the accident and was instructed to take Tylenol to relieve the symptoms.

As a result of the referral from Concentra, the claimant came under the care of Dr. Thomas Friermood, M.D., of Panorama Orthopedics and Spine Center. By August 8, 2007, the claimant's diagnosis included fractures of the second, third and fourth metatarsals. On August 8 Dr. Friermood noted that the claimant could begin to transition to a hard soled shoe and would return in one month for new x-rays. The claimant advised Dr. Friermood that he was "doing well."

On August 10, 2007, Dr. Plotkin noted the claimant's symptoms were "stable." Dr. Plotkin also recorded the claimant was out of the boot and his gait was normal. Dr. Plotkin stated the claimant's restrictions should include no standing and walking in excess of 30 minutes per hour, and the claimant should remain in a seated position 50 percent of the time. The claimant was directed to return for follow-up in one month.

The claimant returned to Concentra on September 10, 2007, and was seen by Glenn Petersen, PA. PA Petersen recorded the claimant was "still limping and has not had therapy." PA Petersen referred the claimant for physical therapy (PT) and imposed restrictions of no prolonged standing or walking. He also directed the claimant to remain seated 25 percent of the time.

On September 13, 2007, Jennifer Jordan, rendered PT at Concentra. The claimant reported left foot pain "mainly with walking and weight bearing." Ms. Jordan noted the claimant was walking on the outside of his foot and exhibited an antalgic gait.

By September 25, 2007, the claimant told a Concentra physical therapist that he was "70% improved." The therapist noted the claimant's gait was "mildly antalgic."

On September 26, 2007, Dr. Ann Dickson, M.D., examined the claimant at Concentra. Dr. Dickson noted the claimant was experiencing significant pain, particularly in the sec-

ond metatarsal when walking. The claimant reported the pain was causing him to limp. Dr. Dickson released the claimant to a two-week trial of regular duty without restrictions.

On October 11, 2007, Dr. Jonathan Bloch, M.D. examined the claimant at Concentra. The claimant reported that regular duty was difficult because of "much ambulation." X-rays were performed indicating non-displaced fractures with non vs. incomplete union at the second, third and possibly fourth metatarsals. Dr. Bloch imposed restrictions against prolonged standing and walking. Dr. Bloch recommended use of a bone stimulator.

In October or November 2007 the employer transferred the claimant to Seattle, Washington for the winter. On November 15, 2007, the claimant began PT at Healthforce Occupational Medicine (Healthforce). On November 15 the claimant reported pain in his left foot, ankle, hip, and later back from not being able to walk correctly.

On February 8, 2008, ARNP Jammi Rutledge of Healthforce referred the claimant for additional PT. ARNP Rutledge prescribed the therapy for left hip muscle spasm, piriformis syndrome and gait training "which are secondary to diagnosis to left foot fracture June 2007 and pneumatic walking boot until January 2008." The claimant underwent PT in February 2008 for a primary complaint of hip pain. The treatment included hip "joint mobilization."

The claimant returned to Colorado in approximately March 2008. On April 18, 2008, he went to Concentra where Dr. John Gray, M.D., performed an examination. Dr. Gray noted that the claimant had returned to his regular duty, which "requires almost constant walking." The claimant advised Dr. Gray that his pain foot pain had increased upon returning to full duty. Dr. Gray stated the claimant's gait was not "significantly antalgic," but was "perhaps a little abnormal" when he started walking. Dr. Gray referred the claimant back to Dr. Friermood and to a podiatrist to "work on permanent orthotic issues."

On April 28, 2008, Dr. Friermood referred the claimant to his partner, Dr. Christopher Hirose, M.D. Dr Hirose is a specialist in foot and ankle treatment. Dr. Hirose examined the claimant on May 6, 2008. Dr. Hirose noted the claimant walked with a moderate limp.

On May 2, 2008, Dr. Gray opined the claimant reached MMI, and that the claimant had no impairment because his range of motion was normal, there was no neurological deficit, and there was no other disorder. However, Dr. Gray noted the claimant had a "persistent mildly antalgic gait." Dr. Gray imposed permanent restrictions of no climbing ladders, limited walking on uneven ground, and directed the claimant to remain seated for 10% of his shift.

Dr. Scott Hompland, D.O. performed a Division-sponsored independent medical examination (DIME) on November 24, 2008. Dr. Hompland noted that the claimant reported a history of developing shin, foot, knee and back pain after he was transferred to Seattle. The claimant stated on the day of the DIME that he was experiencing lumbar pain, ach-

ing in the left hip, anterolateral knee pain, and pain on the top of his foot. On examination Dr. Hompland noted reproducible pain with palpation of the metatarsal heads, but "no reproducible palpatory pain in the lumbar spine." Dr. Hompland assessed foot plantar surface pain when walking, and status second, third and fourth metatarsal fracture with malunion. Dr. Hompland agreed with Dr. Gray's opinions concerning the date of MMI and the claimant's permanent restrictions. However, Dr. Hompland assigned a 7 percent left lower extremity impairment rating based on reduced range of motion in the hind foot. Dr. Hompland opined that no impairment rating is appropriate for the claimant's knee, hip and back. Dr. Hompland stated that the 7 percent lower extremity impairment rating converts to 3 percent whole person impairment.

Neither party disputes that Dr. Hompland's rating of 7 percent of the lower extremity is correct, or that the extremity rating converts to 3 percent whole person impairment. The respondents filed a Final Admission of Liability admitting for permanent partial disability benefits based on Dr. Hompland's scheduled impairment rating.

The claimant testified that he continues to experience problems with pain in his foot despite the provision of orthotics. The claimant also stated that he continues to have difficulty with his gait and experiences hip and back pain that diminishes his ability to walk. The claimant noted that the number of service calls that he is able to make in a day has significantly declined since he has returned to work in Colorado.

The claimant further testified that his gait problems and his hip and back pain affect other aspects of his life. The claimant owns 40 acres of land and has been working with his wife to develop a commercial iris garden. However, his ability to bend is limited and consequently he is unable to do much gardening work. The claimant also raises pug dogs and is sometimes unable to show them in the ring because of problems with his leg and back.

The claimant proved it is more probably true than not that the industrial injury to his left foot has caused him to develop an altered gait, and the altered gait has caused the development of low back pain. The ALJ finds that the fractures of the claimant's left foot and the resulting persistent pain have, over time, caused the claimant to develop an altered gait. The alteration of the claimant's gait becomes more pronounced when he walks for prolonged periods of time. The claimant's testimony that he has developed an altered gait resulting in hip and low back problems is credible. First, the ALJ notes there is no credible or persuasive evidence that the claimant had hip or back problems prior to the industrial foot injury of June 18, 2007. Further, the medical records substantially corroborate the claimant's testimony concerning the development of hip and low back pain as a result of the altered gait. As early as September 10, 2007, PA Petersen documented that the claimant was limping and had not had therapy for that condition. On September 26, 2007, Dr. Dickson documented the claimant's complaint that foot pain was causing a limp. On November 15, 2007, the claimant reported to a physical therapist at Healthforce that he had left foot pain as well as ankle, hip and back pain because he was unable to walk correctly. In February 2008 ARNP Rutledge referred the claimant for additional physical therapy to include "gait training" and joint mobilization

secondary to the June 2007 foot injury. In May 2008, when Dr. Gray placed the claimant at MMI, he documented a "persistent mildly antalgic gait."

It is more probably true than not that the low back pain which the claimant experiences as a result his altered gait has caused functional impairment beyond the leg at the hip. The ALJ credits the claimant's testimony that the low back pain has played a role in diminishing the amount of walking that he can do while working as a gas line worker. Further, the claimant credibly testified that the low back pain interferes with his ability to bend over to work in the garden and his ability to show dogs in the ring.

Although there is some evidence in the record that would support contrary findings, the ALJ does not find that evidence to be persuasive and gives it little weight.

At hearing the parties stipulated that the claimant's average weekly wage is $824.45. Therefore, that issue was removed from the ALJ's consideration and is not determined by this order.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

CLAIM FOR CONVERSION OF SCHEDULED RATING TO WHOLE PERSON RATING

The claimant contends the scheduled rating of the DIME physician, Dr. Hompland, should be converted to a whole person rating because the evidence establishes that he has sustained functional impairment beyond the leg at the hip. The ALJ agrees with the claimant.

Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in subsection (2) of the statute, "the employee shall be limited to the medical impairment benefits as specified in subsection (2)." If the claimant sustains an injury not found on the schedule § 8-42-107(1)(b), C.R.S., provides the claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. Section 8-42-107(8)(c), C.R.S. As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the site of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Pain and discomfort that limit the claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO April 21, 2005).

Section 8-42-107(2)(w), C.R.S., provides for scheduled compensation based on "loss of a leg at the hip joint or so near thereto as to preclude the use of an artificial limb." A claimant may establish the right to whole person impairment benefits if a lower extremity injury causes functional impairment of parts of the body beyond the leg at the hip. *Abeyta v. Wackenhut Services,* W.C. No. 4-519-399 (ICAO September 16, 2004) (claimant entitled to whole person impairment benefits where he proved that a knee injury caused him to limp, which in turn caused back pain that interfered with his ability to stand, sit and walk). The claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the leg at the hip and the consequent right to whole person impairment benefits under § 8-42-107(8)(c). Whether the claimant met the burden of poof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs, supra.*

As determined in Findings of Fact 22 and 23, the claimant proved it is more probably true than not that persistent left foot pain caused by the industrial injury has, over time, led to an altered gait. The alteration of gait has led to hip pain and low back pain. The hip and low back pain tend to become more severe after the claimant walks for a prolonged period of time. The claimant's back pain is located beyond the leg at the hip. Further, the low back pain functionally impairs the claimant's capacity to walk and bend. These functional impairments have decreased the claimant's productivity on the

job because he cannot walk as far as he used to, and have prevented him from performing some activities including gardening and showing dogs.

Under these circumstances the ALJ concludes the claimant proved that the industrial injury of June 18, 2007, has caused functional impairment not found on the schedule of disabilities. In these circumstances, the claimant has proven that Dr. Hompland's 7 percent scheduled impairment rating of the left lower extremity should be converted to a 3 percent whole person impairment rating for purposes of determining the claimant's entitlement to permanent partial disability benefits.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

2. The insurer shall pay permanent partial disability benefits based on a 3 percent whole person impairment rating.

DATED: May 8, 2009

David P. Cain
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-752-313

ISSUES

Whether Respondent has overcome the Division Independent Medical Examination (DIME) physician's opinion regarding permanent impairment, causation and apportionment.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge finds as follows:

1. Claimant was employed by Employer as a bus driver. On February 14, 2008, she was involved in a motor vehicle accident. On the same day, Claimant saw Dr. Annu Ramaswamy and reported neck pain, upper back pain and a headache. Dr. Ramaswamy noted that Claimant had "quite a bit of tenderness in the trapezius and levator regions, more so on the left side than on the right side." Dr. Ramaswamy diagnosed Claimant with a cervical spine strain which appeared more myofascially based as opposed to facet based.
2. At Claimant's request, Dr. Ramaswamy referred Claimant to Dr. David Reinhard. Claimant first saw Dr. Reinhard for this workers' compensation injury on February 28, 2008. Dr. Reinhard previously treated Claimant from August 17, 2006 through April 16, 2007, for an injury to her cervical spine due to a motor vehicle accident (MVA) that occurred on July 18, 2005.
3. Dr. Reinhard detailed his previous treatment of Claimant's neck in the medical record dated February 28, 2008. Specifically, Dr Reinhard noted that Claimant had pain emanating from the left C4-5 and C5-6 facet joints in addition to the overlying myofascial dysfunction and the left cervical paraspinals. Dr. Reinhard last saw Claimant on April 16, 2007, and noted that Claimant was doing well and only experiencing minor residual pain that was self-manageable. Dr. Reinhard noted that Claimant reported complete resolution of her neck pain from the 2005 auto accident approximately two months before the workers' compensation injury and that Claimant sought no further chiropractic treatment from that point forward.
4. Dr. Reinhard noted the differences between Claimant's present symptoms and the symptoms for which he treated her in the past. Claimant had pain and stiffness extending into the left suprascapular region and down into the upper thoracic region to the T4 and T6 level. Claimant also reported a prominent headache complaint with pain on top of her head and at the level of the forehead. These complaints were not present on April 16, 2007.
5. Dr. Reinhard had noted that Claimant's residual symptoms from the motor vehicle accident were mild over the ten months preceding the workers' comp injury.
6. Claimant had received chiropractic care with Steven Hatt, DC, for her 2005 motor vehicle accident. According to Dr. Hatt's treatment records, on October 2, 2007, Claimant reported to Dr. Hatt that her neck was in a chronic state of discomfort. Claimant last saw Dr. Hatt on November 14, 2007 and medical record reflects that Dr. Hatt noted spinal tenderness at C4, C6, C7 T1 and T2, on the right. Dr. Hatt recommended that Claimant return in two or three days. Claimant never returned to Dr. Hatt. Dr. Hatt's records are consistent with Claimant's report to Dr. Reinhard that her previous symptoms had resolved approximately two months before the industrial injury.
7. Dr. Ramaswamy treated Claimant four additional times between February 14 and June 3, 2008. In each medical record, Claimant's pain complaints are noted as well as objective findings including range of motion deficits and spasms.
8. On June 3, 2008, Dr. Ramaswamy placed Claimant at maximum medical improvement (MMI). He noted in the medical record that Claimant complained of tenderness mainly in the left sternocleidomastoid region and had cervical spine range of motion deficits. Dr. Ramaswamy recommended maintenance care for up to six months following the MMI. Dr. Ramaswamy opined that Claimant had no permanent impairment.

9. During the hearing, Dr. Ramaswamy testified that at the time of MMI, he expected Claimant's symptoms to improve from a physiological standpoint which was why he assigned no impairment rating. Dr. Ramaswamy also testified that Claimant had a cervical strain and muscle tenderness resulting from the industrial injury, which he opined usually resolves over the course of treatment.

10. On July 1, 2008, Respondents filed a Final Admission of Liability based on Dr. Ramaswamy's report. Claimant objected and requested a DIME.

11. Dr. Douglas Hemler performed the DIME on October 7, 2008. Dr. Hemler noted the following: well-defined tenderness at C2-3, C5-6, C6-7 and C7-T1 all on the left side; palpation at the C2-3 level replicates headache; and some superimposed nonfocal tenderness involving the cervical paraspinals and left trapezius. Dr. Hemler assessed Claimant as having cervical strain syndrome secondary to work–related motor vehicle accident and residual cervical dysfunction in the form of mild facet pain and possible mild left occipital neuralgia.

12. Dr. Hemler evaluated Claimant for permanent impairment. He determined that Claimant had a seven percent range of motion impairment combined with a four percent cervical spine specific disorder related to soft tissue injury for an 11 percent whole person impairment. He acknowledged that Dr. Ramaswamy did not assign an impairment rating in June 2008. Specifically, Dr. Hemler's report states, "While I understand that impairment was not assigned in June 2008 approximately 4 months after the accident at this time it is clear that the patient meets criteria for rating based on pain of greater than 6 months duration."

13. Dr. Hemler opined that apportionment was inappropriate based on Claimant's report that her symptoms had resolved several months prior to this workers' compensation injury. Dr. Hemler noted that Claimant treated with Dr. Reinhardt for that injury, but that he did not have the specific medical records related to that treatment.

14. During the hearing, Dr. Ramaswamy testified that Dr. Hemler incorrectly determined that Claimant had permanent impairment because although Claimant had documented pain for longer than six months, there were no objective findings. Dr. Ramaswamy felt that by not documenting objective findings in his report, Dr. Hemler did not comply with the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) and the Level II Accreditation curriculum. Dr. Ramaswamy opined that even if Claimant had subjective pain complaints, they were not associated with objective findings.

15. Dr. Ramaswamy based his determination that Claimant had no impairment on his opinion that her symptoms were likely to resolve. Her symptoms, however, did not resolve by the time she saw Dr. Hemler in October 2008.

16. No clear and convincing evidence demonstrates that the determination by Dr. Hemler that Claimant is permanently impaired or that such impairment is causally related to the industrial injury is incorrect. Dr. Ramaswamy disagrees with Dr. Hemler's opinions and suggests that Dr. Hemler did not follow the applicable authority when rating Claimant's neck. Dr. Hemler, however, noted range of motion deficits, which Dr. Ramaswamy agreed constitute an objective finding. Moreover, Dr. Hemler's opinion does not rely upon subjective complaints alone. Dr. Hemler specifically noted that Claimant had cervical strain syndrome, cervical dysfunction and possible neuralgia, all of which he found related to the industrial injury. It is not highly probable that Dr. Hemler's opinion

is incorrect. Dr. Ramaswamy's opinions merely constitute a difference of medical opinion that is insufficient to overcome Dr. Hemler's opinion that Claimant has permanent impairment.

17. No clear and convincing evidence demonstrates that Dr. Hemler's opinion regarding apportionment is incorrect. Claimant had not treated with Dr. Reinhard for the 2005 MVA for nearly 10 months prior to the industrial injury and had not treated with Dr. Hatt for three months prior to the industrial injury. There was no persuasive or credible evidence to the contrary. Consequently, Claimant's impairment rating is 11 percent whole person as determined by Dr. Hemler.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo.App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Sections 8-42-107(8)(b)(III) and (c), *supra*, provide that the finding of a DIME selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004).

5. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (Nov. 17, 2000).

6. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. Industrial Claim Appeals Office*, *supra*.

7. Section 8-42-107(8)(c), C.R.S., provides that the physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings. This section further provides that if either party disputes the authorized treating physician's finding of medical impairment, that party may seek a DIME. Section 8-42-101(3.7), C.R.S., requires the DIME physician to follow the AMA Guides in assigning an impairment rating. The opinion of Dr. Ramaswamy that Dr. Hemler failed to follow the AMA Guides by not documenting objective findings related to Claimant's pain complaints is unpersuasive. Dr. Hemler documented range of motion deficits in addition to Claimant's pain complaints. Dr. Hemler further provided two diagnoses associated with Claimant's pain complaints that he found were related to the industrial injury. Dr. Ramaswamy, however, felt that Claimant's had pain complaints that were not associated with objective findings. Dr. Ramaswamy's opinions merely represent a difference of medical opinion that is insufficient to overcome Dr. Hemler's opinions.

8. Section 8-42-104(2)(b), C.R.S. (2007), provides that any benefit awarded under §8-42-107 shall exclude any previous impairment to the same body part otherwise known as apportionment. Apportionment of medical impairment is a pure medical determination, which when made by the DIME physician is subject to the clear and convincing standard of § 8-42-107(8), C.R.S. *Martinez v. ICAO,* 176 P.3d 826 (Colo. App. 2007). As found, no clear and convincing evidence demonstrates that Dr. Hemler's opinion concerning apportionment is incorrect. The relevant medical records support the conclusion that Claimant's preexisting neck condition had largely resolved prior to the industrial injury on February 14, 2008.

ORDER

It is therefore ordered that:

1. Claimant's impairment is 11 percent whole person and causally related to the industrial injury as determined by Dr. Hemler.
2. Claimant is entitled to permanent partial disability benefits consistent with the above findings and conclusions.
3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

DATED: May 8, 2009

Laura A. Broniak
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-766-412

ISSUES

The following issues were raised for consideration at hearing:

1. Compensability; and
2. Medical benefits;

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant injured his left ankle when he jumped off a fence on the afternoon of June 6, 2008, at approximately 3:30 p.m. Claimant testified that this occurred while he was breaking down scaffolding for the Employer, Fajardo, at Fajardo's personal residence. Fajardo testified that this residence is claimed as his personal residence for tax purposes.

2. Fajardo is the owner of the Employer. The Employer is in the business of painting the interiors of apartments. Fajardo credibly testified that his clients are apartment complexes who use the Employer's services prior to new tenants moving into apartments. The Employer paints a few apartments per month for its clients. The Employer has ongoing relationships with a few apartment complexes, performing interior painting only on multi-unit apartment complexes only. The Employer does not perform work on residential properties.

3. Claimant worked for the Employer doing preparatory, masking, trim work, painting and occasionally he picked up supplies. Claimant began work for the Employer in approximately November of 2007. In June 2008, when Claimant 's injury occurred Fajardo had two employees working for him. Fajardo met Claimant 's spouse who worked for an apartment management company. Claimant 's spouse asked Fajardo to employ her husband. Fajardo did so but only at the multi unit apartment complex managed by the company that his spouse worked for. Claimant worked part time hours for the Employer, based upon availability of work and Claimant 's schedule.

4. Claimant was paid $15 per hour for work done. Fajardo credibly testified that there was a period of time between November 2007 and the date of injury when Claimant did not do any work for the Employer. Fajardo further credibly testified that Claimant told him he was working for another company during this time.

5. On June 6, 2008, the credible and persuasive evidence established that Fajardo and Claimant were painting an interior apartment for the Employer. The work was completed on the afternoon of June 6, 2008. Fajardo and Claimant left the completed apartment. There was no more work for the Employer that day. The Employer's equipment was removed from the apartment, and placed in Claimant 's vehicle. During the week of June 6, 2008 Fajardo's vehicle was not working and he had retained Claimant 's services to drive him around. Claimant was paid during this period for both painting and driving Claimant around.

6. On June 6, 2008, Claimant drove Fajardo home. After they arrived at the residence, Fajardo asked Claimant to disassemble scaffolding from Fajardo's yard. The scaffolding was being used in the building and painting of a porch addition to the home. Claimant never assisted in building the porch or exterior painting of the porch. Fajardo credibly testified that he worked on his residence and contracted with other craftsmen to work on the residence. Fajardo rented scaffolding for the home project, and on the afternoon of June 6, 2008, asked for Claimant 's assistance in disassembling the scaffolding so that it could be returned. Fajardo asked Claimant to do this while still at the apartment complex job.

7. Claimant was promised compensation for helping Fajardo with this project. Fajardo testified that it was his intent to pay Claimant personally for this work. Fajardo credibly testified that Claimant 's job with the Employer was not contingent upon his providing personal assistance to Fajardo on his home project. Fajardo testified that removal of the scaffolding from his home conferred no benefit on the Employer. Disassembly of the scaffolding was almost complete when Claimant jumped from a height off a fence and injured his ankle.

8. Claimant testified that he fractured his ankle in this incident. Medical records show there was no fracture that occurred. Claimant did, however, seek and receive medical attention for an ankle injury. Claimant was seen in the emergency department of North Suburban Medical Center on June 6, 2008. Dr. David B. Hahn performed a repair of the left posterior tibial tendon on August 12, 2008.

9. Fajardo credibly testified that he was aware of Claimant 's fall, but unaware of the need for medical treatment for the incident on June 6, 2008 until he was contacted by the hospital for insurance information later that weekend. Fajardo directed Claimant and the provider to his homeowner's insurance policy, because this is the insurance he believed applied to injury at his private residence. Fajardo testified that he did not consider Claimant an employee of the Employer at the time of his injury.

10. Fajardo testified that, on most occasions, Claimant was paid in cash for his work for the Employer. Fajardo brought cash to Claimant 's wife on the Monday following June 6, 2008 for work done by Claimant the prior week. Fajardo testified that part of that cash represented work done for the Employer and part of it represented the scaffolding-disassembly work done for himself personally. He testified that he made clear to Claimant 's wife that the cash represented two distinct payments from these different sources. Fajardo testified that he always intended to pay Claimant personally for the work done at his home, and not out of the Employer's funds.

11. It is found that Claimant was not within the course and scope of his employment for the Employer at the time he jumped from a fence while disassembling scaffolding for Fajardo at his personal residence.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S., *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to Employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. The right to compensation for an injury springs into being only where the necessary Employer-employee relationship exists, and both the services being performed and the injury sustained arise out of and in the course and scope of employment. *Johnson v. Industrial Comm'n*, 137 Colo. 591, 328 P.2d 384 (1958). Section 8-41-301(1) (c),

C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Section 8-40-102(2), C.R.S. states, "the fact that an individual performs services exclusively or primarily for another shall not be conclusive evidence that the individual is an employee." Regardless of relationships in the past or contemplated for the future, liability for workers' compensation benefits is dependent on the relationship of the parties at the moment a Claimant is injured. *See, Nye v. ICAO,* 883 P.2d 607 (Colo. App. 1994). Conduct at the time of the injury must be under a contract of hire, express or implied. Section 8-40-203(1)(b), C.R.S.

5. A compensable injury must both "arises out of" and occur "in the course of" employment. Section 8-41-301, C.R.S.; *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996). The "course of employment" requirement is satisfied when it is shown the injury occurred within the time and place limits of the employment relationship. However, the "arising out of" requirement is narrower than the course of employment, and is a test of causation which requires that the injury have its origin in an employee's work-related functions and be sufficiently related thereto so as to be considered part of the employee's service to the Employer under the contract for employment. *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991).

6. As found, Claimant was not within the course and scope of his duties and activities for the Employer at the time of his injury. Claimant's ankle injury on June 6, 2008 did not arise out of the employment relationship with the Employer. Claimant 's injury sustained while disassembling scaffolding at the private home of Fajardo did not have origins in his work-related functions for the Employer, which was in the business of painting apartment interiors for apartment complexes. It did not occur during a time or a place associated with the Employer. The evidence presented at hearing established that Claimant 's duties for the Employer included masking, trim painting, and occasionally picking up supplies. His duties did not include working on scaffolding at Claimant 's personal residence.

ORDER

It is therefore ordered that:

The claim for workers' compensation benefits is denied and dismissed.

The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

DATED: May 8, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-549-355

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 29, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 4/29/09, Courtroom 4, beginning at 8:34 AM, and ending at 9:09 AM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel, to be submitted electronically, giving Respondents 3 working days after receipt of a copy thereof within which to file electronic objections. The proposed decision was filed on May 6, 2009. On May 8, 2009, Respondents indicated no objection to the form of the proposed decision. After a consideration of the proposed decision, the ALJ has modified the same and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns Claimant's Petition to Re-Open.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant sustained a compensable right upper extremity (RUE) injury on June 9, 2002. His authorized treating physician (ATP) was Michael L. Dunn, M.D.

2. On February 19, 2003, Neil L. Pitzer, M.D., to whom Dr. Dunn referred the Claimant for a rating, placed the Claimant at maximum medical improvement (MMI). Dr. Pitzer rated the Claimant's permanent disability at 14% of the RUE.

3. Respondents filed a Final Admission of Liability (FAL), dated March 7, 2003, based in part on Dr. Pitzer's opinions, admitting for an MMI date of February 19, 2003; for 14% RUE; but denying any and all benefits not specifically admitted. Dr. Pitzer indicated that Clai,ant "should continue his home exercise program and use the

wrist splint prn." No timely objection to the FAL was filed, and it became final on or about April 7, 2003.

4. After being placed at MMI, the Claimant contacted the insurance carrier in an effort to receive medical maintenance from Dr. Dunn. The carrier denied Claimant's request despite his claimed worsening of condition.

5. The Claimant filed a Petition to Reopen, dated April 22, 2008, within 6 years of the date of his admitted injury, due to the worsening condition of his RUE, including his right shoulder, with the attached report of his former ATP, Dr. Dunn, dated March 19, 2008. The four corners of this report lead to an inference that the Claimant's right shoulder condition had worsened since 2003.

6. Dr. Dunn issued a clarifying report, dated May 30, 2008, stating as follows: "It is my professional medical opinion…that the patient's [Claimant's] shoulder injury is worsening; he is no longer at maximum medical improvement due to the worsening…."

7. The ALJ took administrative notice that the Claimant winced when requested to raise his right arm at the April 29, 2009 hearing.

8. Respondents alleged that the Claimant must have sustained an intervening injury to cause the worsening of his condition. Respondents, however, offered no persuasive evidence to support the allegation regarding an intervening event.

9. The ALJ finds that it is more probably true than not that Claimant's condition has worsened and that the worsening is proximately and causally connected to the June 9, 2002 compensable injury. The Claimant's testimony regarding the worsening of his condition was supported and corroborated by Dr. Dunn's medical records and reports. Claimant's testimony was forthright and credible. It is essentially undisputed by any persuasive evidence that Claimant's causally related RUE condition worsened since he was placed at MMI in 2003.

10. Claimant has proven, by a preponderance of the evidence that his RUE condition has changed and worsened since he reached MMI in February 2003.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. The medical opinions, and the Claimant's testimony, on the causally related worsening of his RUE since MMI are essentially un-contradicted. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard uncontradicted testimony.

b. Under Section 8-43-303(1), C.R.S. (2008), an ALJ may re-open a claim, within 6 years of the date of injury, based on a worsening of condition after MMI. See *El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Burke v. Industrial Claim Appeals Office,* 905 P. 2d 1 (Colo. App. 1994); *Hanna v. Print Express, Inc.,* 77 P. 3d 863 (Colo. App. 2003); *Donohoe v. ENT Federal Credit Union,* W.C. No. 4-171-210 [Industrial Claim Appeals Office (ICAO) September 15, 1995]. This is true because MMI is the point in time when no further medical care is reasonably expected to improve the condition. Section 8-40-101(11.5), C.R.S. (2008); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Where a claimant seeks to re-open based on a worsened condition, the claimant must demonstrate a change in condition that is "causally connected to the original compensable injury." *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). *See also Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002); *City and County of Denver v. Industrial Claims Appeal Office*, 58 P.3d 1162 (Colo. App. 2002). As found, the Claimant filed his Petition to Reopen within 6 years of the date of his admitted injury and he has proven a worsening of condition, causally related to the original admitted RUE injury.

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing a change of condition and entitlement to a re-opening. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has sustained his burden of proof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant's claim in W.C. No. 4-549-355 is hereby reopened.

B. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of May 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-775-176

ISSUES

¬ Did claimant prove by a preponderance of the evidence that he sustained an injury arising out of the course and scope of his employment?

¬ Did claimant prove by a preponderance of the evidence that he is entitled to medical and temporary disability benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

Employer operates a mattress factory, where claimant worked as a builder of box spring mattress frames. Clay Smith is superintendent of the plant. Claimant's date of birth is April 1, 1962; his age at the time of hearing was 47 years. Claimant started working for employer in September of 2008. Claimant contends he injured his left knee, right hip, and lower back on October 14, 2008. The Judge adopts the stipulation of the parties in finding claimant's average weekly wage is $395.30.

Builders assemble box spring mattress frames at metal tables that hold pieces of wood in place while workers on either side of the tables secure them, using glue and a nail gun. A completed frame weighs between 60 and 90 pounds. As a builder, claimant was required to stand throughout his shift, while turning to bins behind him to reach for wood parts to place on the metal table for assembly. Claimant and his coworker were paid by the piece; the more mattress frames they produced, the greater their pay.

Claimant testified to the following regarding the mechanism of injury: On October 14, 2008, claimant was building frames with Juan Garcia. Claimant and Garcia were working fast to assemble a higher than normal number of mattresses. Around 2:00, p.m., claimant and Garcia had assembled some 195 mattresses. Claimant laid down the nail gun, turned, and bent down to pick up another piece of wood from the bin behind him. As claimant bent to pick up the wood piece, his right leg gave out and he twisted and popped his left knee. Claimant stood while holding the pieces of wood he had picked up, turned left toward the table, and experienced pain in his hip, his back, and his left leg. Claimant held onto the workbench, prompting Garcia to ask if he was ok. Claimant told Garcia: "I hurt myself". Garcia responded by saying that he heard something pop. Claimant responded to Garcia: "That was my knee". Other coworkers (Juan and Robert) working at a workbench next to claimant asked claimant if he was all right.

Claimant testified that he left his workstation after the incident on October 14th and walked around the warehouse in an attempt to walk it off. Claimant stated that he told "Rob" that he hurt his back and hip. Claimant said he ran into the shipping supervisor, Octavio Baeza, and told Octavio that he injured himself. Claimant says he told Garcia, Octavio, and Rob about his injury before finishing his shift and leaving for home on October 14th. Claimant said that his right side ached during the evening of October 14th and that he was unable to straighten his left knee.

Claimant further testified to the following: Claimant returned to work on October 15th and attempted to build frames with Garcia. Claimant says he told Garcia and Rob he could not perform his work and needed to see a doctor. According to claimant, his supervisor, Mike Pluguez, came out and asked him what happened, then Clay Smith came out and asked him what happened. Claimant failed to explain how Mike or Clay learned of his injury before coming to his workbench area. Claimant says Clay asked him to demonstrate how he injured himself. Claimant says he told Clay that he twisted his right side and felt pain in his lower back and groin and that he messed up his left knee. After that, Clay told claimant to go to the doctor.

Juan Garcia testified to the following: Garcia confirmed that he worked with claimant on October 14th. Garcia did not recall seeing claimant injure himself, did not recall hearing claimant's knee pop, and did not recall hearing claimant tell him he injured himself. Garcia testified he had no idea that claimant injured himself on October 14th. Garcia's inability to recall witnessing claimant's injury is equivocal and insufficiently strong to directly contradict claimant's testimony.

Garcia further testified: He learned from claimant on the morning of October 15th that he had injured himself. At that time, claimant told Garcia he injured himself the week before; he did not say he injured himself on October 14th. Claimant told Garcia he was not working with him when he hurt himself. Garcia demonstrated where on his body claimant told him he injured himself, pointing to his right-sided groin area approximately 1 to 2 inches below the belt line. Claimant did not tell Garcia that he injured his left knee, lower back, right thigh, or right knee. From the time claimant started working at employer, and before October 14th, claimant typically appeared stiff in the mornings and appeared to limp. Garcia and claimant produced an average number of mattresses on October 14th.

Clay Smith testified to the following: Clay has worked for employer for some 23 years; he currently oversees daily operations of the plant. Clay was working on his computer in the office with Mike Pluguez on the morning of October 15th when claimant came in to report his injury. Clay's testimony contradicts that of claimant because Clay denies that he came out onto the floor to learn of claimant's injury. Claimant told Clay that his injury involved a lump on the right side of his groin. Claimant thus reported a right groin injury to Clay. Claimant did not report a left knee, lower back, right hip or thigh injury to Clay. Claimant told Clay and Pluguez he bent over to pick up slat pieces and felt pain in his right side. Claimant did not appear in discomfort. Claimant told Clay that he preferred to try to walk it out before seeking medical attention. Claimant returned to the office ap-

proximately an hour later saying he was in too much pain and asking for medical treatment. Again, claimant reported only a groin injury, and not a left knee, lower back, right hip or thigh injury.

Clay further testified to the following: Clay referred claimant to Stephen Danahey, M.D. When he returned to work after his appointment with Dr. Danahey, claimant was wearing a knee brace on his left knee. Although Clay was surprised when he saw claimant wearing a knee brace, he said nothing and sent claimant home because of the restrictions. Clay had noticed that claimant had a slight limp when he first started working for employer, well before October 14th. Claimant returned to work on October 27, 2008, when Clay found him a light duty job to perform. Employer laid claimant off on November 7, 2008.

Octavio Baeza testified to the following: Octavio supervises the shipping and delivery operation. The shipping area is on the opposite side of the plant from the production area where claimant worked. Contrary to claimant's testimony, Octavio did not witness claimant injure himself on October 14th. At around 9:30, a.m., on October 15th, claimant told Octavio he injured his right groin area. Claimant did not tell Octavio that he injured his left knee, right thigh, right hip, or lower back. Claimant only reported inuring his right groin. Claimant later asked Octavio several times to sign a statement that said he was present when claimant injured himself. Octavio refused to sign the statement because he was not present when claimant contends he injured himself. When claimant returned from the doctor, he mentioned a knee injury to Octavio.

Mike Pluguez testified to the following: Pluguez is the lead dock person and claimant's direct supervisor. Pluguez walked the plant with claimant on his first day of work and noticed he walked with a slight limp. Pluguez noticed claimant typically had trouble climbing steps in the morning and had to grab the bar to stand up. Pluguez's testimony about claimant reporting his injury was consistent with that of Clay. Claimant first reported his injury to Pluguez on the morning of October 15th while Pluguez and Clay were working together in the office. Claimant complained of pain in his groin area. Pluguez was unable to recall how claimant said he hurt himself. Claimant did not complain of any left knee, lower back, right hip or right thigh pain. Although Pluguez and Clay offered claimant medical attention he initially rejected the offer. Claimant returned to the office an hour later requesting a referral for medical attention. At the time claimant requested medical attention, he did not complain of any left knee, lower back, right hip or right thigh pain. Pluguez did not see claimant when he returned from seeing Dr. Danahey. On October 16th, Clay told Pluguez that claimant returned from Dr. Danahey's office wearing a knee brace and complaining of a back problem. Pluguez continued to observe claimant walk after October 14th and noted that claimant's limp was the same as before October 14th.

At Dr. Danahey's office on October 15, 2008, claimant completed a "Patient Information" form, indicating the following about how the injury occurred:

> I was lifting up some wood frames I felt some thing (sic) stretch [in] my right upper leg and my left knee.

When Dr. Danahey examined claimant, he recorded the following history:

> [Claimant] does repeated bending and straightening up, as well as lifting and stacking of the frames. He indicates that in the process of doing all of this, he twisted his left knee and also developed pain in his right groin, in the right hip, the right gluteal area and the right thigh.

Consistent with his testimony, claimant reported to Dr. Danahey that the injury occurred around 2:00 p.m. on October 14th.

Dr. Danahey referred claimant to Richard Mobus, D.C., for chiropractic treatment of his back on October 30, 2008. Dr. Mobus recorded the following history:

> October 14, [claimant] repetitively reaching forward, lifting, turning and reaching overhead of load weighing 40-60 pounds. **As he reached overhead to place a 60 pound load on an overhead shelf** then bent forward to the right, **he experienced sudden onset of low back pain** which has persisted without notable improvement.

(Emphasis added). The Judge infers that, because Dr. Mobus was treating claimant's back pain, he did not obtain a history of injury to claimant's left knee. Nonetheless, the mechanism of injury claimant reported to Dr. Mobus is markedly different from his testimony and from what he reported to Dr. Danahey. Claimant denied any prior back injury requiring medical care.

Dr. Danahey referred claimant to Orthopedic Surgeon Mark Failinger, M.D., who evaluated claimant left knee on November 6, 2008. Dr. Failinger recorded the following:

> On 10/14/2008, 1 particular box spring he was twisting and had a pain and a pop that occurred with discomfort.

The Judge infers from this that Dr. Failinger concentrated on a twisting-type mechanism injury to claimant's left knee, which is not overly inconsistent with claimant's testimony concerning the mechanism of injury. Dr. Failinger diagnosed a bucket-handle meniscus tear. Dr. Failinger also suspected claimant had torn the anterior cruciate ligament (ACL). Dr. Failinger recommended claimant get off his feet to avoid further crushing the meniscus. Dr. Failinger recommended claimant undergo arthroscopic surgery to remove the bucket-handle meniscus tear, undergo post-surgical therapy to regain motion, and later undergo surgery to reconstruct the ACL.

On January 29, 2009, claimant told Dr. Danahey he had concerns about Dr. Danahey's prior reports describing the mechanism of injury. Dr. Danahey asked claimant to describe it again. Dr. Danahey testified:

> [O]n January 29th he told me that he was squatting down to pick up some wooden pieces, that his right foot slipped a few inches, and then his left knee popped.

> He picked up those pieces, turned to his left side, and then experienced pain in his right lower back, the right gluteal area, and the right groin.
>
> ****
>
> [This description] is a change of the description [from what claimant reported on October 14th]. **I personally did not regard it as being that significant, because I did understand from [claimant] that his work was very heavy and that he did a substantial amount of lifting, bending, turning, and squatting**.

(Emphasis added). Regarding the overhead lifting mechanism of injury Dr. Mobus and a physical therapist alike recorded, Dr. Danahey stated:

> [Claimant] is, I think, a very poor historian and has a great deal of trouble describing what happened. I think he has been very contradictory.
>
> What does come through, though, is that **his work … is very physical and does involve heavy lifting, bending, twisting, squatting**, **And that is a somewhat consistent feature throughout all the descriptions of the injury**, to be fair to [claimant].

(Emphasis added).

Claimant denied to Dr. Danahey any prior injury to parts of his body he claims he injured at employer. Respondents provided Dr. Danahey claimant's prior medical records that documented prior injuries or conditions involving claimant's left knee and right hip/groin region. In one example, claimant injured his left knee when he fell on it on March 2, 2007. Crediting Dr. Danahey's testimony, that fall was significant enough to cause swelling and possibly internal derangement. Dr. Danahey testified:

> On the other hand, a bending, squatting injury could also potentially cause a meniscal tear to the knee. Although the mechanism there is somewhat weak, it does not seem at all probable … that it could cause an ACL tear to the knee, like a substantial left knee contusion could cause.

Regarding claimant's preexisting right hip condition, Dr. Danahey stated:

> [Claimant] has a documented history of right hip arthritis and degenerative change. And the twisting mechanism that he describes could cause that arthritic condition to flare or become symptomatic.
>
> But it's not likely that it would cause a significant injury to the hip. And is certainly would not be a cause of the arthritis, itself.

While claimant agreed that he denied preexisting problems involving his left knee and right groin/hip region, he offered no persuasive explanation for such denial.

Dr. Danahey agreed that Dr. Failinger's recommendation for arthroscopic surgery to repair the medial meniscus and to explore the left knee is reasonable. Dr. Danahey however disagrees that the mechanism of injury claimant described would cause the ACL tear; he testified:

> I think it would still need to be established as to whether that ACL tear, if present, is related to the work injury, as that is typically a much more substantial injury to the knee and requires a much more substantial mechanism of injury.

Dr. Danahey qualified this statement by saying he would defer to Dr. Failinger's opinion concerning causation of the ACL tear. There was no persuasive evidence otherwise showing that Dr. Failinger has given his opinion about causation of claimant's likely ACL tear.

Dr. Danahey's medical testimony was credible and persuasive. Crediting Dr. Danahey's testimony, the preexisting limp that lay witnesses observed when claimant walked says little about the reason for the limp since none of the lay witnesses is medically trained to discern what was causing claimant to limp.

Claimant showed it more probably true than not that he sustained a right groin/hip injury while working for employer on October 14, 2008. Claimant's story that he injured his right groin is consistent with what he reported to employer's witnesses and to Dr. Danahey on the day following his injury. The Judge credits Dr. Danahey's medical opinion in finding claimant aggravated the preexisting arthritic condition in his right hip area.

The Judge finds it problematic to claimant's credibility that he denied preexisting conditions without offering any persuasive explanation for such denial. The Judge however finds it critically important to claimant's overall credibility that his testimony regarding the mechanism of injury was consistent with what he reported to his boss, Clay, on October 15, 2008. While claimant's testimony concerning the mechanism of injury differs somewhat from the story he reported to Dr. Danahey on October 15th, the stories are reconcilable. Claimant's testimony merely is more detailed than the story he gave Dr. Danahey on October 15th. The Judge credits Dr. Danahey's testimony in finding claimant a very poor historian. The Judge infers from Dr. Danahey's testimony that, while claimant reported inconsistent mechanisms of injury to various providers, claimant's story is sufficiently consistent to support a medical finding that he injured his left knee while working for employer. Under the totality of the circumstances, the Judge credits claimant's testimony concerning the mechanism of his injury as slightly more probable than not.

Crediting claimant's testimony, the Judge finds the following probable mechanism of injury: On October 14, 2008, claimant laid down the nail gun, turned, and bent down to pick up another piece of wood from the bin behind him. As claimant bent to pick up the wood piece, his right leg slipped and he twisted and popped his left knee. Claimant stood while holding the pieces of wood he had picked up, turned left toward the table, and experienced pain in his right hip/groin area and his left leg. The Judge otherwise rejects as improbable other versions claimant has reported of his mechanism of injury.

Claimant showed it more probably true than not that he sustained a medial meniscus injury to his left knee while working for employer on October 14, 2008. The fact that claimant initially reported a right groin injury to employer's witnesses supports his claim that he sustained some type of injury while working for employer. The Judge declines respondents's invitation to infer that claimant did not injure his left knee because he only reported a right groin injury to employer's witnesses. In finding that claimant sustained a left knee injury, the Judge is persuaded by the fact that claimant reported such injury the first time Dr. Danahey examined him on October 15, 2008. While claimant failed to report specific left knee symptoms to any of employer's witnesses, there was no persuasive evidence otherwise showing that any of employer's witnesses asked questions to flesh out claimant's symptoms. By contrast, Dr. Danahey is medically trained to ask such questions to flesh out symptoms of an injury. Absent such training, it is not surprising that none of employer's witnesses questioned claimant about the symptoms of his injury. The Judge therefore credits Dr. Danahey's report in finding it more probably true that claimant injured the medial meniscus of his left knee.

The question whether claimant's injury includes a tear of the ACL of his left knee currently is not ripe, pending arthroscopic exploration of the knee by Dr. Failinger. The Judge thus reserves to the parties the issues whether claimant in fact has an ACL tear and whether it might be related to his mechanism of injury.

Claimant showed it more probably true than not that medical treatment provided by Dr. Danahey and his referrals is reasonable and necessary to cure and relieve the effects of his injury. Claimant showed it more probably true than not that medical treatment recommended by Dr. Failinger is reasonable and necessary to cure and relieve the effects of his injury.

Claimant showed it more probably true than not that his injury proximately caused his wage loss from November 8, 2008, ongoing. Light duty physical activity restrictions imposed by Dr. Danahey on October 15, 2008, precluded claimant from performing his regular work building mattress frames. Employer provided claimant light-duty work through the time it laid him off on November 7, 2008. Claimant sustained a wage loss from November 8, 2008, because of restrictions due to his injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

A. Compensability:

Claimant argues he has proven by a preponderance of the evidence that he sustained compensable injury. The Judge agrees.

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of

litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that his injury arose out of the course and scope of his employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

The Act distinguishes between the terms "accident" and "injury." The term "accident" refers to an unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), *supra*. By contrast, an "injury" refers to the physical trauma caused by the accident. Thus, an "accident" is the cause and an "injury" the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable injury. A compensable industrial accident is one, which results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

Here, the Judge found claimant showed it more probably true than not that he sustained a right groin/hip and left knee injury while working for employer on October 14, 2008. Claimant thus proved by a preponderance of the evidence that he sustained compensable injury.

Because claimant's story was replete with inconsistencies, the Judge found it problematic to credit claimant's testimony as sufficiently reliable and probable to support his claim. In weighing the totality of the evidence, the Judge found claimant's story concerning the mechanism of his injury slightly more probable than not.

The Judge found claimant's story that he injured his right groin consistent with what he reported to employer's witnesses and to Dr. Danahey on October 15, 2008, the day following his injury. The Judge credited Dr. Danahey's medical opinion in finding claimant aggravated the preexisting arthritic condition in his right hip area.

The Judge declined respondents's invitation to infer that claimant did not injure his left knee because he only reported a right groin injury to employer's witnesses. In finding that claimant injured the medial meniscus of his left knee, the Judge was persuaded by the fact that claimant reported such injury the first time Dr. Danahey examined him on October 15, 2008. The Judge credited the medical training of Dr. Danahey over the lack of such training of employer's witnesses in finding it more likely claimant would report left knee symptoms to Dr. Danahey. The Judge thus credited the left knee symptoms claimant reported to Dr. Danahey on October 15th over what he failed to tell employer's witnesses.

The Judge concludes that insurer should provide claimant workers' compensation benefits under the Act for his right groin/hip and left knee injury. The Judge thus reserves to the parties the issues whether claimant in fact has an ACL tear and whether it might be related to his mechanism of injury.

B. Medical and Temporary Disability Benefits:

Claimant argues he has proven by a preponderance of the evidence that he is entitled to medical and temporary disability benefits. The Judge agrees.

Section 8-42-101(1)(a), supra, provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

Respondents thus are liable for authorized medical treatment reasonably necessary to cure and relieve the employee from the effects of the injury. Section 8-42-101, *supra*; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by

restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

The Judge found claimant showed it more probably true than not that medical treatment provided by Dr. Danahey and his referrals and that medical treatment recommended by Dr. Failinger were reasonable and necessary to cure and relieve claimant of the effects of his injury. The Judge further found claimant showed it more probably true than not that his injury proximately caused his wage loss from November 8, 2008, ongoing. Claimant thus proved by a preponderance of the evidence that he is entitled to medical and temporary disability benefits.

The Judge concludes insurer should pay for reasonable and necessary medical treatment provided by Dr. Danahey and his referrals. Insurer should pay for arthroscopic surgery recommended by Dr. Failinger to address the torn meniscus in claimant's left knee. Insurer should pay claimant TTD benefits from November 8, 2008, ongoing, pursuant to the Act.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Insurer shall provide claimant workers' compensation benefits under the Act for his right groin/hip and left knee injury.

2. Insurer shall pay for reasonable and necessary medical treatment provided by Dr. Danahey and his referrals.

3. Insurer shall pay for arthroscopic surgery recommended by Dr. Failinger to address the torn meniscus in claimant's left knee.

4. Insurer shall pay claimant TTD benefits from November 8, 2008, ongoing, pursuant to the Act.

5. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

6. Issues not expressly decided herein, including whether claimant in fact has an ACL tear and whether it might be related to his mechanism of injury, are reserved to the parties for future determination.

DATED: May 11, 2009

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-452-382

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 29, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 4/29/09, Courtroom 4, beginning at 1:30 PM, and ending at 3:15 PM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel. The proposed decision was filed, electronically, on May 8, 2009. On the same date, Respondents filed objections, electronically. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues to following decision.

ISSUES

The issues to be determined by this decision concern permanent total disability (PTD); and, Respondents entitlement to statutory offsets for Federal Social Security Disability (SSDI) benefits and recovery of an overpayment of combined temporary and permanent partial disability benefits (PPD), paid pursuant to the Final Admission of Liability (FAL), dated August 8, 2008, which admitted for 29% whole person PPD. Because the statutory cap on combined temporary and PPD benefits had been reached, Respondents claimed a credit of $21,543. 62 for an overpayment.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant's date of birth is January 4, 1959, and he was 5o years old at the time of hearing. Claimant quit school in the 11th grade, but went on to earn his G.E.D. Claimant has had no subsequent education after earning his G.E.D.

2. Claimant sustained a compensable injury to his back on January 22, 2000, while working for the Employer. Respondents ultimately filed a Final Admission of Liability (FAL), dated August 8, 2008, admitting for a maximum medical improvement (MMI) date of April 28, 2008; for temporary disability benefits through April 27, 2008; pursuant to a stipulation of February 5, 2002, for an average weekly wage (AWW) of $671.80; for PPD benefits, based on 29% whole person; for mental impairment of 16%, benefits limited to 12 weeks; and, a claim for an overpayment of $21,543.62, based on combined temporary and PPD benefits exceeding the statutory cap pf $120,000 at the

time. The FAL also admitted for reasonably necessary and causally related post-MMI medical benefits.

3. Claimant has treated with multiple medical providers for the industrial injury. He has been diagnosed as suffering from chronic thoracic strain with myofascial pain, and major depressive and anxiety disorders.

4. Claimant has been unable to find employment. The Claimant testified that he cannot not work because of functional limitations that stem from a combination of his admitted industrial back injury and psychiatric condition, and the medications he takes to address his medical problems. The ALJ finds the Claimant's testimony credible and, essentially undisputed in this regard.

5. On July 3, 2007, Christopher Ryan, M.D., Claimant's authorized treating physician (ATP) placed Claimant at maximum MMI for his physical injury and assigned Claimant a 29% whole person impairment rating. Dr. Ryan pointed out in his report of July 3, 2007, that the 29% was "exclusive of psychiatric rating."

6. Claimant has had an evaluation by a Division-sponsored independent medical examiner (DIME) on three separate occasions since his case began, all with the same State-selected physician, Khoi Pham, M.D. On the second evaluation, which occurred on September 6, 2007, the DIME physician found that Claimant was not a MMI for his psychiatric condition, and concurred in Dr. Ryan's assignment to Claimant of a 29% whole person impairment for his T- and LS-spine impairments, and set forth that:

> I doubt the patient is capable of earning any gainful employment, being on larger amounts of pain and mood altering medications for his physical and mental condition.

7. On January 28, 2008, while Claimant was in psychiatric treatment prior to reaching MMI for his psychiatric condition, Dr. Ryan expressed the opinion that "[Claimant] has a physical impairment which prevents gainful employment and will continue throughout his life."

8. Following extensive psychiatric treatment with ATP Bert S. Furmansky, M.D., Claimant was released psychiatrically at MMI on April 24, 2008. In the report releasing Claimant at MMI, Dr. Furmansky set forth that Claimant's work status as "unable to work" and that "he is permanently totally disabled."

9. Following Dr. Furmansky's report, Claimant was returned for his third DIME (*i.e.*, second follow-up) with DIME physician, Dr. Pham, who on June 17, 2008, confirmed that Claimant was at MMI as of April 28, 2008, and assigned Claimant a 40% whole person impairment rating comprised of 29% physical and 16% mental.

10. On August 8, 2008, Respondents filed a "Final Admission of Liability," based on Dr. Pham's opinions.

11. On August 15, 2008, Claimant filed a "Response to Final Admission of Liability" accepting the rating of permanent medical impairment in the Respondents' August 8, 2008 FAL, but objecting to the remainder of the FAL. Thereafter, Claimant filed an "Application for Hearing and Notice to Set" on the issue of permanent total disability benefits.

12. In the Respondents' case in chief, they relied on the opinions of Independent Medical Examiners (IMEs) they selected to evaluate Claimant as to his ability to engage in employment. Respondents relied on the reports of L. Barton Goldman, M.D., and Robert E. Kleinman, M.D., a psychiatrist. Both Dr. Goldman and Dr. Kleinman's reports date from 2007. The most recent submission from Dr. Goldman was not a medical report, but rather handwritten responses to questions posed by the Respondents' vocational evaluator, Patrick Renfro, concerning approximately ten potential jobs for claim.

13. Dr. Goldman's most recent response to Renfro in addressing jobs, however, was to place a limitation on every job on the "need to change prolonged static position ten minutes/hour." Renfro indicated that any of the potential jobs he had located were subject to the limitations indicated by Dr. Goldman.

14. Testimony from Patrick Renfro established that Claimant had basically found a job that was within his physical and mental limitations prior to his admitted January 22, 2000, injury, which required limited contact with other individuals. The ALJ finds, however, that after Claimant's admitted injury, the combination of Claimant's more severe psychological problems, added in with his physical problems completely limited Claimant's ability to find or maintain employment. Claimant's impulse control issues and medication issues are not a recipe for sustained employment.

15. Claimant credibly testified that he has been looking for employment and looked for the jobs that the Respondents' vocational evaluator alleged were available in the community for him to perform. Claimant received no leads on any job opportunities.

16. The ALJ finds credible the opinion that the Claimant cannot sustain work due to severe chronic pain that affects him physically, mentally, and emotionally. The record contains substantial evidence supporting this finding.

17. The Claimant's vocational expert, John Macurak, concluded that Claimant's injury and psychiatric outlook makes him unemployable and Claimant cannot sustain work at a physical demand level due to severe chronic pain that affects him physically, mentally, and emotionally. Among other things, Claimant's "poor impulse control" is one factor that conspires to make Claimant unemployable. The material reviewed by Macurak, including medical reports and information supplied by the Claimant regarding his own view of limitations supports Macurak's conclusions.

18. The ALJ notes that the Respondents' vocational expert, Renfro, was of the opinion that Claimant was employable. The ALJ find this is a conclusory opinion. Renfro's underlying bases for the opinion include the idea that any potential jobs would be

subject to accommodations, specifically, Dr. Goldman's limitations. Therefore, Renfro's opinion concerning the Claimant's "employability" is unpersuasive. The ALJ places more weight on the fact that Respondents' vocational expert relied upon the opinions of Respondents' IME physicians with regard to Claimant's work limitations. Claimant's physical and psychiatric ATP's, as well as the DIME examiner, are of the opinion that Claimant is unable to work.

19. Claimant is currently receiving Social Security Disability Insurance (SSDI) benefits.

20. Although Respondents have proven entitlement to offsets for SSDI benefits and all of its payments of PPD benefits, pursuant to the FAL of August 8, 2008, they capped the combined temporary and PPD benefits, which resulted in an alleged overpayment of $21, 543.62, which is now moot because Claimant is PTD and there is no cap on PTD benefits. Therefore, Respondents have failed to prove the claimed overpayment of $21, 543.62.

21. Claimant reached MMI on April 28, 2008.

22. The Claimant has proven, by a preponderance of the evidence that he is not employable or capable of earning wages in the competitive job market on an unrestricted basis. Therefore, the Claimant has proven by preponderant evidence that he is permanently and totally disabled.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, the opinions on un-employability of the Claimant's ATPs are more persuasive and credible than the opinions of IME Dr. Goldman and Kleinman that Claimant is employable because they are based on more

study and research and they are more consistent with the totality of the evidence. Also, Claimant's testimony that he has been unable to find any employment is credible, persuasive, and essentially un-disputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits, including permanent total disability benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has established entitlement to PTD benefits. As found, Claimant has sustained his burden of proof with respect to PTD. As further found, although Respondents established entitlement to offsets for SSDI benefits and all of its payments of PPD benefits, pursuant to the FAL of August 8, 2008, they capped the combined temporary and PPD benefits by the FAL, which resulted in an alleged overpayment of $21, 543.62, which is now moot because Claimant is PTD and there is no cap on PTD benefits. Therefore, Respondents are not entitled to credits against PTD benefits for amounts they did not actually pay.

c. Section 8-40-201(16.5)(a), C.R.S. (2008), defines permanent total disability as a claimant's inability "to earn any wages in the same or other employment." The overall objective of this standard is to determine whether, in view of all of these factors, employment is "reasonably available to a claimant under his or her particular circumstances." *Weld County School District RE-12 v. Bymer,* 955 P.2d at 550 (Colo. 1998). In determining whether a claimant is permanently and totally disabled, an ALJ may consider the claimant's "human factors," including the claimant's age, work history, general physical condition, education, and prior training and experience. *Weld County School District RE-12 v. Bymer, supra; Joslin's Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The test for permanent total disability is whether employment exists that is reasonably available to a claimant under her particular circumstances. *Id.* This means whether employment is available in the competitive job market, which a claimant can perform on a reasonably sustainable basis. As found, Claimant has proven that he is incapable of earning wages in the competitive labor market, on a reasonably sustainable basis, and there is no work reasonably available to him.

d. The Claimant is required to prove permanent total disability by a preponderance of the evidence. See *Younger v. City and County of Denver,* 810 P.2d 647

(Colo. 1991), *Gonzales-Rivera v. Beacon Hill Investment, Inc.,* W.C. No. 4-124-250 [Industrial Claim Appeals office (ICAO), September 27, 1994]. Permanent total disability does not need to be proven by medical evidence. *See Baldwin Construction Inc., v. Industrial Claim Appeals Office*, 937 P.2d 895 (Colo. App. 1997); *Calvert v. Roadway Express, Inc.,* W.C. No. 4-355-715 (ICAO, November 27, 2002). The ALJ herein, however, has relied upon medical evidence, the opinions of the Claimant's vocational expert, two ATPs and the DIME physician and the testimony of the Claimant. The opinions of the Claimant's vocational expert also relied in part on the medical evidence and representations made by the Claimant.

e. In making a PTD determination, the ALJ has considered the effects of the industrial injury in light of the Claimant's human factors, including the Claimant's age, work history, general physical condition, and prior training and experience. *Weld County School District RE 12 v. Bymer, supra*; *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). The crux of the test is the "existence of employment that is reasonably available to the Claimant under his or her particular circumstances." *Weld County School District RE v. Bymer, supra*; *Joslins Dry Goods Co v. Industrial Claim Appeals Office*, *supra* As found, the Claimant is not capable of employment or earning wages. Therefore, he is permanently and totally disabled..

f. Further, the Claimant is not required to prove that the industrial injury is the sole cause of his permanent total disability. *See e.g., Climax Molybdenum Co. v. Walter,* 812 P.2d 1168 (Colo. 1991); *Colorado Fuel & Iron Corp. v. Industrial Commission*, 151 Colo. 18, 379 P.2d 153 (1962) [if personal factors, such as preexisting mental or physical condition, combine with work-related injury or disease to render worker permanently and totally disabled, Claimant entitled to PTD benefits]. As found, Claimant's poor impulse control is one factor that makes him un-employable. Given the Claimant's human factors which include his age, education, physical condition, mental condition, and his use of medications, he is permanently and totally disabled. Further, his job attempt efforts make clear that he is unable to earn any wages in any occupation due to the numerous problems stemming from his back and psychiatric injuries.

g. Based on Claimant's stipulated AWW of $671.80, he is entitled to PTD benefits of $447.86 per week, less the SSDI offset, and a credit for PPD benefits paid from April 28, 2008.

h. Pursuant to the provisions of Section 8-42-103 (1) (c) (I), C.R.S. (2008), Respondents are entitled to an SSDI offset of one-half of SSDI benefits from the date of the initial award. *See Englebrecht v. Hartford Acc. & Indem. Co.*, 680 P.2d 231 (Colo. 1984) [SSDI offsets permitted as of rate at time of initial award]. Also, Respondents are entitled to a credit for all PPD benefits actually paid, pursuant to the FAL of August 8, 2008.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the Claimant permanent total disability benefits of $447.86 per week, less the Federal Social Security Disability (SSDI) offset permitted by law; and, Respondents may take a credit for all permanent partial disability benefits actually paid to the Claimant, pursuant to the Final Admission of Liability, dated August 8, 2008.

B. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

C. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of May 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-777-330

ISSUE

The issue for determination is compensability.

FINDINGS OF FACT

1. Claimant filed a workers' compensation claim for a low back injury and numbness in his foot on November 3, 2008, which he alleged resulted from his foot slipping when the axel on a dolly spun causing Claimant to lunge forward.

2. Claimant called Rivas November 3, 2009, and told him that he had pulled his hamstring. Claimant was directed by Employer to Employer's occupational medicine clinic where he was first treated by Dr. Morrison. Dr. Morrison asked Claimant for a medical history. Claimant stated that he had an L5-S1 disc repair 16 years prior and had no low back pain, numbness, tingling or weakness in the lower extremities since then. Claimant further advised Dr. Morrison that he did not have a second job and that he had not previously hurt that body part. Dr. Morrison took Claimant off work pending a follow-up evaluation with Dr. Smaldone on November 5, 2008.

3. On November 5, 2008, Spratta, an adjuster for Employer, recorded an interview with Claimant. Spratta asked Claimant whether there were any medical conditions that he treated for on an ongoing basis, whether Claimant participated in sports, and the name of Claimant's primary care physician. Claimant denied ongoing treatment, participation in sports and denied having a primary care physician. Claimant also denied

treating with any doctors since 1996 except for physicals. Claimant was asked to identify the doctor that saw him outside of work. Claimant responded that it was "Dr. Beach" for a DOT physical. Claimant was then asked whether he had received any other treatment for his back, or had any problems with his back, since his surgery in 1996. Claimant denied any other treatment.

4. Claimant was evasive and deceptive when responding to the adjuster's questions regarding medical treatment for his low back condition prior to November 3, 2008 and his participation in sports. Claimant admitted that he did not answer the adjuster's questions truthfully and to the best of his knowledge. The adjuster asked Claimant seven times to reveal the name of any doctor who had treated Claimant for low back problems and each time Claimant did not give a truthful answer. Claimant denied any participation in sports. However, three months later, in response to interrogatories propounded by Respondent, Claimant admitted that he was a basketball referee and had worked approximately 25 to 30 basketball games between March and October 2008.

5. Contrary to Claimant's responses to Dr. Morrison and the claims' adjuster denying previous treatment, medical and chiropractic records from 1996 through 1998 indicate that Claimant had been involved in a motor vehicle accident in December 1996 and required one year of chiropractic treatment from December 1996 through December 1997, and an additional three months treatment including three epidural injections between January and March 1998. The treatment at that time involved injury to the L4-5 disc. Additionally, Claimant sustained an injury to his back in early August 2008 when he lifted his son. Dr. Gillette's August 23, 2008 note indicated an assessment of degenerative disc and joint disease with a possible herniated nucleus pulposis. Claimant continued to receive treatment from Dr. Gillette, a chiropractor, on ten occasions between August 23, 2008 and October 31, 2008, - three days before his evaluation by Dr. Morrison.

6. The intake form for Dr. Gillette filled out by Claimant on August 23, 2008 indicated that Claimant quantified his pain as 7/10 and further indicated that Claimant was taking Vicodin for the pain. Claimant described the pain was as extending to the mid hamstring with numbness. The pain was described as moderate to severe, sharp, shooting, daily, and that the pain was "getting better". Claimant indicated that the pain was moderately interfering with his normal work and that "some of the time" his condition would interfere with his social activities. Claimant affirmed that he had similar symptoms in the past.

7. Claimant's explanation for not telling Dr. Morrison about the medical treatment he required after the motor vehicle accident 1996 or his ongoing chiropractic treatment since August 23, 2008 is not persuasive or credible. The medical and chiropractic records indicate that the level treated in 2006 and in August 2008 was the L4-5 level, which is the same level being treated for the present back condition.

8. Dr. Smaldone referred Claimant to Andrew Castro, MD. Dr. Castro's report indicated that Claimant advised him that he had a microdiscectomy in 1996, that he had recovered fully from that injury, and that did not have any symptoms after recovery prior to

November 3, 2008. Claimant did not provide Dr. Castro or Dr. Morrison with an accurate and complete medical history. The opinions of causation by Dr. Morrison and Dr. Castro are not persuasive.

9. Dr. Smaldone reevaluated Claimant on November 26, 2008. Dr. Smaldone asked Claimant to again describe the mechanism of injury and to actually demonstrate the movements at the time of the alleged injury. Claimant advised Dr. Smaldone that he was injured while "scooping beer". Dr. Smaldone noted that when Claimant first described the injury during the demonstration that he described that his right foot had come back towards him as it slipped off the axle and the load fell toward the wall. Dr. Smaldone had Claimant repeat the demonstration three times. Each time Claimant specifically stated that the load fell toward the wall and specifically denied that the load fell toward him. However, Claimant did change his statement indicating that instead of moving toward him, his foot moved away from him. Dr. Smaldone concluded that there was no way that Claimant's right foot could have translated as far forward as he described because his foot would have hit the back of the dolly, the dolly itself would have hit the cases of beer, and there were several cases of beer laying right up against the wall.

10. Based upon Claimant's demonstration of the mechanism of injury, Dr. Smaldone noted that with Claimant's foot extending well in front of him, Claimant was put in a position where his body weight would have been centered over his hips and supported by his left thigh. Dr. Smaldone noted that as the load did not fall backwards toward Claimant, there was no need to stabilize or catch the dolly and load. Dr. Smaldone stated that sufficient trauma was not induced during Claimant's attempt to scoop beer. Dr. Smaldone opined that the forward translation of the load would have been minimal in light of the stacking of the cases and their position against the wall, thus none of the biomechanical factors in this case would lead one to think that a significant trauma was dealt to the lumbosacral area leading to a problem with a disc and subsequent impingement upon a spinal nerve causing an L5 radiculopathy. It is the opinion of Dr. Smaldone that the mechanism of injury as described by Claimant was insufficient to cause Claimant's current low back condition. Dr. Smaldone's opinion is persuasive.

11. After Dr. Smaldone advised Claimant that he did not believe that the mechanism of injury described by Claimant caused his low back condition, Claimant sought an independent medical opinion from Dr. Crosby. Claimant reported a history of injuring his low back as a result of twisting his back while moving beer. It is further noted that the report submitted by Dr. Crosby does not mention the 1996 motor vehicle accident or the August 2008 low back injury while lifting his son. Claimant did not provide Dr. Crosby an accurate history. Dr. Crosby's opinion is not persuasive.

12. Dr. Gillette, in his report of February 26, 2009, opined that Claimant had a significant injury at work on November 3, 2008 resulting in a disc bulge at L4-5. Dr. Gillette's opinion is not persuasive.

13. Dr. Smaldone has also expressed his opinions on causation. Dr. Smaldone had a complete history. Dr. Smaldone stated that Claimant's pre-existing condition worsened in August 2008 and that the most reasonable inciting event was the episode where

Claimant lifted his son prior to meeting with Dr. Gillette on August 23, 2008. Dr. Smaldone further noted that what is seen from Dr. Gillette's notes from August 23, 2009 through February, 2009 is a very natural progression for lumbar disc disease, a kind of waxing/waning course. Dr. Smaldone further reiterated that the incident described by Claimant would not have resulted in a significant trauma to Claimant's back and would not have resulted in a herniated disc. The opinions of Dr. Smaldone are credible and persuasive.

14. The incident on November 3, 2008, did not cause Claimant's condition, did not aggravate Claimant's pre-existing condition, and did not accelerate Claimant's need for treatment.

CONCLUSIONS OF LAW

For a claim to be compensable under the Workers' Compensation Act, a claimant must prove by a preponderance of the evidence that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. CRS 8-41-301(1) (c); *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006).

This claim concerns an injury to Claimant's low back which he alleges occurred on November 3, 2008 while delivering beer to his account. Whether a claimant has met that burden of proof is a factual question. *Dover Elevator Co v. Industrial Claim Appeals Office, 961 P.2d 1141 (Colo. App. 1998)*; *Faulkner v. Industrial Claim Appeals Office, 12 P.3d 844, 846 (Colo. App. 2000)*. In determining causation, the ALJ must make determinations of credibility. The ALJ's resolution of the credibility of witnesses is a factual determination. *Varsity Contractors and Home Insurance Co. v Baca, 709 P.2d 55 (Colo. App. 1985).* In making credibility determinations, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and/or actions: the reasonableness or unreasonableness (probability or improbability) of the witness' testimony and/or actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936).

In this claim there are many inconsistencies in Claimant's testimony. Claimant has admitted that he was not truthful when responding to questions concerning his medical history and sports activities. Claimant had advised Dr. Morrison that he had had no back pain and no numbness, tingling or weakness in the lower extremities since his disc repair 16 years earlier. However, medical and chiropractic records from 1996 through 1998 indicated that Claimant was involved in a motor vehicle accident in December 1996 that exacerbated his low back condition requiring one year of chiropractic treatment and an additional three months of epidural injections for low back pain and radiculopathy. Claimant did not tell Dr. Morrison that he had been receiving chiropractic treatment for his low back since August 23, 2008 as a result of lifting his son or that he had been treated by Dr. Gillett as recently as October 31, 2008, prior to his appointment with Dr. Morrison.

Claimant has had extensive chiropractic and medical treatment to his low back as a result of injuries sustained in sports, a motor vehicle accident, and as the result of lifting his son. Claimant is not a credible witness. Based upon the evidence that Claimant advised Dr. Gillette that he injured himself while lifting his son two weeks prior to the August 23, 2008 visit, resulting in low back pain and radicular symptoms into the lower extremity, and the lack of convincing evidence that the mechanism of injury described by the Claimant involving the dolly was sufficient to cause a low back injury, the ALJ finds that Claimant has not proven by a preponderance of the evidence that he sustained an injury in the scope and course of his employment with Employer.

The issue of causation, even medical opinions involving causation, rests to some extent on the credibility of the Claimant and his statements concerning the history of the accident. *Cabral v. Landry's Restaurants, Inc.,* WC No.:4-693-007, (ICAO, May 11, 2007). Claimant gave inconsistent accounts of his medical history, employment/sports activities, and the mechanism of injury, to the adjuster and the medical care providers. The mechanisms of injury described by the Claimant are not supported from a clinical perspective. The lifting incident involving Claimant's son better explains Claimant's current back issues.

Claimant has not shown by a preponderance of the evidence that he sustained an injury in the scope and course of his employment with Employer.

ORDER

It is therefore ordered that the claim is denied and dismissed.

DATED: *May 11, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-777-159

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered an inguinal hernia and lower back injuries during the course and scope of his employment with Employer on October 6, 2008.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of any industrial injuries.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $116.25.

FINDINGS OF FACT

1. Claimant worked for Employer as a laborer. He intermittently performed various odd jobs around Employer's facility in order to complete a renovation project.

2. Claimant testified at the hearing in this matter. He explained that on October 6, 2006 at approximately 8:30 a.m. he was assisting Rocky Clark, owner of Employer, in moving steel pipes onto a trailer. Claimant remarked that, while moving the second pipe, he experienced pain in his lower abdominal region and lower back. He noted that the pipe weighed approximately 125 to 150 pounds. Claimant explained that he and Mr. Clark moved a total of approximately eight to ten pipes but that the most of the pipes were lighter than the one that caused his pain. He commented that his pain increased in severity over the two weeks following the pipe incident.

3. In contrast to Claimant's testimony, Mr. Clark testified that Claimant did not work for Employer on October 6, 2006. Instead, Mr. Clark stated that on Friday, October 10, 2006 Claimant raked crushed asphalt around Employer's facility. Toward the end of the day at approximately 2:30 p.m., Mr. Clark was moving steel pipes by himself to a trailer that was about three feet off the ground. Mr. Clark remarked that Claimant came over and helped him move the steel pipes. There were only three pipes remaining to be moved and they were each approximately one and one-half inches in diameter. He noted that he and Claimant lifted one end of each pipe. They moved the pipes approximately 15 feet. Mr. Clark noted that the whole process lasted approximately five to ten minutes. After moving the pipes, Claimant did not state that he had been injured and did not exhibit any signs of an injury.

4. During the week of October 13, 2006 Claimant finished raking asphalt around Employer's facility and performed painting duties. The painting work involved climbing up and down ladders. Claimant completed the painting projects at approximately 12:00 p.m. on Friday, October 17, 2006. Claimant did not exhibit any difficulties in completing his job duties. Because the renovation of Employer's facility was complete, Employer did not have any additional work for Claimant.

5. On Monday, October 20, 2006 Claimant contacted Mr. Clark to inquire whether any work was available. Mr. Clark responded that Claimant's projects were completed and no additional work was available.

6. On Tuesday, October 21, 2006 Claimant informed Mr. Clark that he was unavailable to work because he needed to take his wife to a doctor. However, after returning from the doctor, Claimant again called Mr. Clark inquiring about work. Mr. Clark advised Claimant that no work was available.

7. On Wednesday, October 22, 2006 Claimant arrived at Employer's facility and asked Mr. Clark if there was any work available. Again, Mr. Clark informed Claimant that there was no work to be done. Claimant then told Mr. Clark that his wife's doctor had examined him during his wife's appointment on the previous day. The doctor told Claimant that he had a hernia. Mr. Clark testified that Claimant then asked him if he had any insurance coverage that could help with medical costs. Mr. Clark replied that he could not help because Claimant was not injured on the job.

8. Mr. Clark subsequently received paperwork from Claimant regarding a Workers' Compensation injury. He attempted to contact Claimant but was unsuccessful. On about November 6, 2006 Mr. Clark's wife, who was also an owner of Employer, contacted Claimant over the telephone. Claimant reported that he sustained a hernia while bending over to pick up a pipe on October 6, 2006. However, Ms. Clark corroborated Mr. Clark's account that Claimant did not work on October 6, 2006.

9. On November 6, 2006 Claimant visited Cathy Smith, M.D. for an evaluation. He reported that on October 6, 2006 he was lifting a 25 foot long piece of pipe with Mr. Clark. Claimant explained that he experienced a "pulling sensation and some pain in the lower left quadrant, as well as some discomfort in his low back." Dr. Smith noted that, when Claimant's pain did not resolve after two weeks, he visited his primary care physician and was diagnosed with a hernia. Dr. Smith thus opined that the lifting incident could have caused the following: (1) "abdominal strain with probable left inguinal hernia; and (2) lumbar strain with left leg pain."

10. Dr. Smith referred Claimant to Steven Dubs, M.D. for an evaluation. Dr. Dubs recommended a surgical repair of Claimant's left inguinal hernia.

11. On January 29, 2009 Claimant visited Gregory Reichhardt, M.D. for an independent medical examination. Claimant reported that he had been lifting a 125-150 pound piece of metal tubing with Mr. Clark and "felt a little pain and a little snap in the groin area." The pain worsened as the day progressed. Dr. Reichhardt diagnosed Claimant with a left inguinal hernia and lower back pain. He noted that the medical records revealed that Claimant suffered from a history of chronic lower back pain.

12. Dr. Reichhardt considered whether Claimant's work for Employer caused his injuries. He concluded that a determination about whether Claimant's work duties caused the hernia depended on the weight of the pipe that Claimant had been lifting. Dr. Reichhardt explained that, if the pipe weighed in the range of 125-150 pounds, it was probable that the hernia constituted a work-related injury. However, he remarked that the referral letter from Respondents' counsel reflected that the pipes that Claimant had lifted were 12-15 feet in length and weighed less than two pounds per foot. The pipe thus weighed between 24 and 30 pounds. Dr. Reichhardt concluded that, if the pipe weighed 24-30 pounds, it was unlikely that the lifting incident caused the hernia. Finally, Dr. Reichhardt determined that, because the medical records reflected that Claimant suffered from chronic lower back pain, it was unlikely that the October 6, 2006 lifting incident caused his lower back condition.

13. Claimant has failed to demonstrate that it is more probably true than not that he suffered an inguinal hernia and lower back injury. Initially, although Claimant testified that he experienced pain in his lower abdominal region and lower back while moving a pipe with Mr. Clark on October 6, 2006, he did not report any incident to Employer. In fact, Claimant continued to rake asphalt and perform painting duties for Employer during the week following the lifting incident. Furthermore, although Employer subsequently informed Claimant that no additional work was available, Claimant continued to inquire about more work. Moreover, Dr. Reichhardt concluded that a determination about whether Claimant's work duties caused the hernia depended on the weight of the pipe that Claimant had been lifting. Although Claimant asserted that the pipe weighed between 125-150 pounds, his testimony lacks credibility. In contrast to Claimant's account, the lifting incident did not occur until near the end of his workday on October 10, 2006 and he only helped to move three pipes. Accordingly, it is unlikely that Claimant suffered a hernia while performing his job duties for Employer. Finally, the medical records reveal that Claimant suffered from chronic lower back pain. Based on the credible testimony of Dr. Reichhardt, it is thus unlikely that Claimant's job duties aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered an inguinal hernia and lower back injury. Initially, although Claimant testified that he experienced pain in his lower abdominal region and lower back while moving a pipe with Mr. Clark on October 6, 2006, he did not report any incident to Employer. In fact, Claimant continued to rake asphalt and perform painting duties for Employer during the week following the lifting incident. Furthermore, although Employer subsequently informed Claimant that no additional work was available, Claimant continued to inquire about more work. Moreover, Dr. Reichhardt concluded that a determination about whether Claimant's work duties caused the hernia depended on the weight of the pipe that Claimant had been lifting. Although Claimant asserted that the pipe weighed between 125-150 pounds, his testimony lacks credibility. In contrast to Claimant's account, the lifting incident did not occur until near the end of his workday on October 10, 2006 and he only helped to move three pipes. Accordingly, it is unlikely that Claimant suffered a hernia while performing his job duties for Employer. Finally, the medical records reveal that Claimant suffered from chronic lower back pain. Based on the credible testimony of Dr. Reichhardt, it is thus unlikely that Claimant's job duties aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

DATED: May 11, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-784-977

ISSUES

Whether Claimant sustained a compensable injury and whether he is entitled to medical benefits for the treatment of such injury.

FINDINGS OF FACT

Based upon the evidence presented during the hearing, the Judge finds as fact:

1. Claimant filed his claim for workers' compensation, and the Respondent filed no response which Claimant construed as a denial of liability. The Claimant, or his attorney, learned from the Division of Workers' Compensation that Respondent did not have workers' compensation insurance at the time of the injury. Claimant then filed an Application for Expedited Hearing with the Office of Administrative Courts. Respondent filed no response to the Application. A hearing date was selected and the Office of Administrative Courts mailed a notice to Respondent on April 6, 2009 advising the parties that a hearing was scheduled on May 7, 2009 at 8:30 a.m. Respondent failed to appear thus the hearing was conducted in its absence.
2. Chuck Pennington is the owner of Respondent Employer formerly located on East Evans Avenue in Denver, Colorado.
3. Claimant worked for the Respondent as an auto mechanic. Claimant customarily worked five days per week.
4. On June 16, 2008, Claimant was helping a co-worker remove a half-full fuel tank from a Jeep that was hoisted on a lift about eight or nine feet above the ground. As the tank was unbolted, control was lost and the tank fell onto the Claimant's shoulder and upper and mid-back.
5. Claimant reported the injury to Pennington who did not refer Claimant to a medical treatment provider. Pennington, instead, offered Claimant paid time off from work to rest.
6. Immediately following the injury, Claimant underwent minimal treatment with an osteopath and a massage therapist.
7. On April 1, 2009, Claimant sought treatment with Dr. Perry Haney. Claimant reported to Dr. Haney that he had moderately severe to severe thoracolumbar spine pain with bilateral lower extremity pain and parasthesia. Dr. Haney's impression was probable thoracolumbar three-joint complex disorder with bilateral lower extremity sciatic radiculitis/radiculopathy. Dr. Haney referred Claimant for an MRI and prescribed medications. Claimant also saw a physical therapist in Dr. Haney's office.

8. Claimant returned to Dr. Haney on April 6, 2009. Dr. Haney's note reflects that the MRI results were negative, but that he believed Claimant has nodulations and disc protrusion at L4-L5 with annular tearing and high intensity zone. Dr. Haney felt that these conditions were responsible for Claimant's symptom complex. Dr. Haney recommended lumbar epidural steroid injections and referred Claimant for a formal course of physical therapy.

9. On April 14, 2009, Dr. Perry performed the lumbar epidural steroid injection.

10. Claimant testified that although he feels better now, immediately following the injury he had pain, which worsened over time.

11. Based on the foregoing, Claimant has established that he sustained an injury while in the course and scope of his employment with Respondent. Claimant has also established that he is entitled to medical benefits to treat his injury, including payment for treatment he has already received.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with employer. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arise out of " requirement is narrower and requires claimant to show

a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Id.*

5. As found, Claimant has established by a preponderance of the evidence that he sustained an injury on June 16, 2008 when a fuel tank fell on him causing symptoms in his back, shoulder and legs. Claimant provided credible and undisputed testimony as to the mechanism of injury and the symptoms that followed. The medical records further support Claimant's account of the injury, symptoms and need for medical treatment.

6. Respondents are obligated to provide medical benefits to cure or relieve the effects of the industrial injury. Section 8-42-101(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Based on the finding of compensability, Claimant has also established that he is entitled to reasonable and necessary medical treatment to cure and relieve the effects of the work injury. Respondent is responsible for providing to Claimant such reasonable, necessary and related medical benefits including payment for treatment Claimant already received.

ORDER

It is therefore ordered that:

1. Claimant sustained an injury on June 16, 2008 while in the course and scope of his employment with Respondent.
2. Respondent is responsible for medical benefits that are reasonable, necessary and related to Claimant's work injury, including payment for treatment Claimant has already received.
3. The Respondent shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
4. All matters not determined herein are reserved for future determination.

DATED: May 13, 2009

Laura A. Broniak
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-713-762

ISSUES

The issue for determination is sanctions for violation of an order.

FINDINGS OF FACT

1. Notice of the hearing set for May 12, 2009, at 9:00 a.m. was mailed to Claimant's last known address of P.O. Box 16263, Colorado Springs, CO 80935. Claimant did not appear for the hearing.
2. Pre-Hearing Administrative Law Judge Carolyn Sue Purdie entered an order on October 30, 2008. The order required Claimant to appear for a follow-up Division IME on November 24, 2008, at 4:30 p.m. at the office of Dr. Jim DiNapoli.
3. Claimant did not appear for that scheduled appointment.
4. Claimant willfully violated the October 30, 2008, Order of PALJ Purdie.

CONCLUSIONS OF LAW

Claimant did not appear for the hearing. The Office of Administrative Courts sent notice of the hearing to Claimant at the most recent address provided by Claimant. An order may enter against Claimant. Rule 23, OACRP.

Respondents have shown that Claimant intentionally violated the order of PALJ Purdie. Sanctions may be imposed on Claimant. Section 8-43-207(p), C.R.S.

It is concluded that the appropriate sanction under the circumstances of this case is that the claim be closed. Claimant may only receive additional benefits if the claim is reopened pursuant to Section 8-43-303, C.R.S.

ORDER

It is therefore ordered that this claim is closed.

DATED: *May 13, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-751-533

ISSUES

The issues for determination are compensability of this claim for an occupational disease – cervical radiculopathy, authorized medical care providers, medical benefits, and temporary total disability benefits. The parties stipulated to the maximum temporary total disability rate.

FINDINGS OF FACT

1. Claimant was employed by Employer since August 2002. His job involved route sales. Claimant held a similar job for eleven years before starting with Employer. In his job for Employer, Claimant would load his truck with bread products, drive to his ac-

counts, unload product, and load returns back into the truck. At the end of the day, he would unload returns at a thrift store and return to the warehouse.

2. The product to be loaded onto the truck was on trays. The trays slid onto racks in the truck. As he loaded product, previously loaded trays would be pushed back. To unload product, Claimant would use a "pull pole" to move the trays pushed into the truck back to the end of the truck so product could be retrieved. This work involved use of his upper extremities over shoulder height.

3. In January 2002, Claimant complained of recurrent neck and back pain. In September 2002, it was noted that Claimant had weak lateral muscles in his back. Neck pain was noted in December 2003. Neck pain was again noted in February and March 2004. Shoulder and neck pain was noted in April, May, June, September, October, and November 2004.

4. Claimant noticed a weakness in his shoulder as he was moving product out of his truck in September 2007. In January 2008, Claimant felt a tear in his left arm. He noticed that his shoulder had atrophied. Claimant felt there was a connection between the weakness in September 2007 and the atrophy in January 2008. Claimant filed his Workers' Claim for Compensation in February 2008 and was assigned this claim number.

5. Daniel M. Peterson, M.D., examined Claimant on January 11, 2008. He treated Claimant for an injury that occurred January 10, 2008, and is the subject of a different claim. He noted that Claimant had atrophy of the left shoulder. He stated it was not the result of the acute January 10, 2008, injury. He advised Claimant to see his own physician for the non-work related condition. In his report of February 8, 2008, Dr. Peterson stated that the January 10, 2008, injury was near MMI, but further workup by Claimant's physician was necessary for a final diagnosis. Dr. Peterson stated that he would discuss the case with Claimant's physician, Dr. Tewes.

6. A report from Dr. Hammerberg was submitted and Dr. Hammerberg testified at the hearing. Dr. Hammerberg is of the opinion that Claimant's shoulder condition is not the result of the January 10, 2008, acute injury. The report and testimony of Dr. Hammerberg is not helpful in determining what caused Claimant's left shoulder weakness noticed in September 2007 or atrophy noticed in January 2008.

7. L. Bradford Tewes, M.D., examined Claimant on January 22, 2008. Claimant complained of shoulder weakness and pain. Dr. Tewes noted visible atrophy involving the left shoulder girdle, specifically the supraspinatus and infraspinatus muscles. In an addendum, Dr. Tewes stated that Claimant's problems were directly related to his work duties. This opinion of Dr. Tewes is not credible, as Dr. Tewes did not base his causation determination on a diagnosis of cervical radiculopathy.

8. Dr. Tewes saw Claimant again on March 3, 2008. Dr Tewes noted chronic progressive left shoulder pain and disability with gross muscular atrophy suggestive of denervation process. Dr. Tewes referred Claimant for nerve conduction studies and a consultation with Dr. McDonald.

9. T. Drake McDonald, M.D., did a nerve conduction study on March 26, 2008. The study showed a mononeuropathy of the left axillary nerve. A cervical radiculopathy was not seen. Dr. McDonald recommended an MRI and blood tests.

10. Dr. Tewes reviewed the test results on May 2, 2008. He stated that the cause of Claimant's mononeuropathy was not evident.

11. Dr. McDonald examined Claimant again on May 6, 2008. He noted that Claimant had a left axillary mononeuropathy of unclear origin. On July 11, 2008, Dr. McDonald stated that Claimant's picture was most consistent with a left axillary mononeuropathy. He referred Claimant to Dr. Bee for possible spine surgery. On October 31, 2008, Dr. McDonald stated that there was a low likelihood that Claimant would improve with surgical exploration of his axillary nerve.

12. Todd M. Adams, D.C., Claimant's treating chiropractor for many years, prepared a report dated August 13, 2008. Dr. Adams stated that he concurred with the diagnosis of left axillary mononeuropathy, cervical degeneration, and spinal stenosis consistent with Claimant's work duties involving repetitive and ongoing reaching, pushing, and pulling. This opinion is not based on a diagnosis of a cervical radiculopathy, and is not persuasive as to the cause of a cervical radiculopathy.

13. Dr. Simpson examined Claimant on December 16, 2008. He stated that Claimant had a significant multi-level cervical radiculopathy and that Claimant was a candidate for surgery. Dr. Simpson did not comment on the cause of the cervical radiculopathy.

14. Joseph J. Illig, M.D., examined Claimant on January 9, 2009, on a referral from Dr. Seybold. Dr. Illig noted that electrodiagnostic studies done in January 2009 showed acute and chronic left C5 radiculopathy. His assessment was that Claimant was suffering from "left C5 radiculopathy with atrophy and weakness." He referred Claimant for a repeat MRI. On January 23, 2009, Dr. Illig met with Claimant again after the repeat MRI. He stated that the MRI showed significant left foraminal stenosis at C4 and C5 with compression of the C5 nerve root. Dr. Illig's assessment was cervical radiculopathy. Dr. Illig stated that there was a low probability for improvement of strength or a reversal of the atrophy from surgery.

15. The opinion of Dr. Illig that Claimant suffers from a cervical radiculopathy is credible and persuasive. Dr. Illig did state that Claimant's symptom in September 2007 is "of unknown etiology of gradual onset." Dr. Illig did not state a cause of Claimant's cervical radiculopathy.

16. Concentra is Employer's authorized medical care provider for worker's compensation injuries. Dr. Peterson is a physician who works out of Concentra. Dr. Peterson referred Claimant to his personal physician for care for Claimant's shoulder weakness and atrophy. Dr. Tewes is Claimant's personal physician. Dr. Tewes referred Claimant to Dr. MacDonald. Dr. MacDonald referred Claimant to Dr. Bee.

17. Claimant left work because of his occupational disease on February 23, 2008. Claimant worked for another employer starting on December 5, 2008. Claimant left work for that other employer due to his occupational disease on March 10, 2009.

CONCLUSIONS OF LAW

Section 8-40-201(14), C.R.S., defines an occupational disease as follows:

> `Occupational disease' means a disease which results directly from the employment or conditions under which the work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and

> which does not come from a hazard to which the worker would have been equally exposed outside the employment.

The question of whether a claimant proved the conditions of employment caused or contributed to a disease is a question of fact. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App. 1999). Moreover, if the duties of employment aggravate or accelerate a preexisting condition so as to cause a need for treatment, the treatment is compensable. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo.App. 2001); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo.App. 1990); *Seifried v. Industrial Comm'n*, 736 P.2d 1262 (Colo.App. 1986). A claimant is not required to prove the conditions of the employment were the sole cause of the disease. Rather, it is sufficient if a claimant proves the hazards of employment caused, intensified, or aggravated to some reasonable degree the disability for which compensation is sought. *Anderson v. Brinkhoff,* 859 P.2d 819, 824 (Colo. 1993).

Dr. Tewes' opinion that Claimant's shoulder weakness and atrophy was directly related to his job duties is not persuasive, as Dr. Tewes did not have a correct diagnosis. Dr. Adams, a chiropractor, also did not have the correct diagnosis when he stated that Claimant's condition was work-related.

Claimant has established that his left shoulder is weak and has atrophied as a result of a cervical radiculopathy. Claimant has not established that his cervical radiculopathy was caused, aggravated, or accelerated by the duties of his employment. Claimant has not met his burden to establish that he suffers from an occupational disease. The claim must be denied and dismissed.

ORDER

It is therefore ordered that the claim is denied and dismissed.

DATED:

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-781-603

ISSUES

¬ Did claimant prove by a preponderance of the evidence that she sustained a right-shoulder injury arising out of the course and scope of her employment on October 17, 2008?

¬ Did claimant prove by a preponderance of the evidence that she sustained an occupational disease type injury involving her neck and bilateral upper extremities?

¬ Did claimant prove by a preponderance of the evidence that she is entitled to medical benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

Claimant has worked for employer for some 9 years microfilming documents. Claimant's duties involve scanning trays full of documents. The trays were some 2 feet long and contained documents stacked some 4 inches high. The trays weighed between 25 and 65 pounds. Claimant lifted the trays using both upper extremities from shelves located at her shoulder height and above. John Alonso is claimant's direct supervisor. Diane Alfonso is manager of the microfilming unit.

In the spring of 2008, claimant noticed both upper extremities developing aching symptoms after working all day scanning documents. Claimant initially noticed these symptoms in the evening after working her shift. Claimant's symptoms persisted and gradually appeared during the day while using her upper extremities to perform her work activities. The aching started in claimant's wrists and eventually radiated up each extremity toward her shoulders. Along with aching symptoms, claimant also experienced numbness of both upper extremities.

Claimant's symptoms markedly worsened on October 17, 2008, when she slipped on water while walking out of the bathroom at work. While leaving the bathroom, claimant held the door open with her left hand. As claimant slipped on the water, she fell toward her right side and hit her right shoulder on the wall. Claimant did not fall to the floor. Claimant heard a click either in her right shoulder or right-sided neck as her shoulder fell against the wall. Claimant developed increased pain at the top of her right shoulder and neck region.

Prior to October 17th, claimant was able to manage her pain with over-the-counter pain medication. The pain claimant experienced in her right shoulder after October 17th prevented her from sleeping. During the evening of October 20th into the early morning of the 21st, claimant awoke with numb arms that to her seemed to stop working. Claimant's husband transported her to the emergency department of St. Joseph Hospital (ER), where she was seen for neck pressure, tingling arm, and anxiety. The ER physician treated claimant for high blood pressure and directed her to follow up with her primary care physician (PCP) at Kaiser Permanente.

While at the ER, claimant's husband left a voice message for John Alonso. Claimant also telephoned Alonso that morning, explaining that she had been treated for high blood pressure and had been directed to see her PCP.

On October 22, 2008, claimant went to Kaiser, where PCP Stacey Mason, M.D., examined her. Dr. Mason noted claimant reported tingling in her bilateral arms from her shoulders into her first 3 fingers, without numbness or weakness. Dr. Mason diagnosed hypertension and occupational pain, noting claimant's work involved repetitive work with both hands. Dr. Mason had claimant's blood drawn for a metabolic panel. Dr. Mason also diagnosed carpal tunnel syndrome (CTS), provided splints, and referred claimant to follow up with workers' compensation if her symptoms persisted.

Claimant saw another PCP, Felipe Hernandez, M.D., at Kaiser for right arm pain on Saturday, October 25, 2008. According to claimant, Dr. Hernandez was more thorough than Dr. Mason in asking questions about causation of her arm and neck symptoms. Based upon Dr. Hernandez's questioning, claimant reported a 1-week history of right-sided neck pain and pain in her right arm that increased when she raised her arm. Dr. Hernandez noted claimant had slipped in the bathroom, hitting her right arm against a wall. Dr. Hernandez noted this caused an immediate onset of mild pain that increased the following day. Dr. Hernandez noted claimant upset that, while she had informed Dr. Mason of the bathroom incident three days earlier, Dr. Mason had not addressed her arm symptoms. Following physical examination of claimant's neck and shoulders, Dr. Hernandez diagnosed right rotator cuff tendonitis, without signs of a complete tear. Dr. Hernandez referred claimant to physical therapy, gave her pain medications, and restricted her physical activity to light duty.

Claimant returned to work on Monday, October 27, 2008, and reported the October 17th bathroom incident to John Alonso and Diane Alfonso. Claimant also told Alonso she had aching pain in her arm before October 17th that she related to microfilming activity. Alonso gave claimant paperwork to complete. Claimant asked Alonso what date to use for the date of injury. Claimant seems to have thought that using October 17th as the date of injury might lead people to ignore the fact that she had symptoms before that date. Claimant believed that her long-standing symptoms prior to the slip in the bathroom on October 17th suggested that her microfilming work might be causing her symptoms. Claimant chose October 27th as the date of injury based upon Alonso's suggestion she use the date she first reported the injury to representatives of employer.

Diane referred claimant to Concentra Medical Centers, where Jan C. Updike, M.D., examined her on October 27th. Claimant was uncertain what to report to Dr. Updike, so she focused on the occupational exposure, attributing her right arm symptoms to her microfilming activity at employer. Claimant continued to see various physicians at Concentra, including Christian O. Updike, M.D., until insurer denied her claim. Claimant last saw Dr. Chris Updike on February 12, 2009. Crediting claimant's uncontroverted testimony, none of the examining physicians at Concentra asked claimant whether she sustained an accident that might have contributed to her symptoms. Claimant thus told the various physicians who evaluated her through workers' compensation only about the onset of symptoms through occupational exposure to her microfilming activity.

On November 20, 2008, Occupational Therapist Mary Hamilton Hines, OTR, performed an ergonomic evaluation to identify risk factors associated with claimant's workstation.

Therapist Hines offered recommendations to claimant how she could modify activities that might be causing muscle tension, resulting in symptoms of pain involving her neck, right shoulder, and upper extremities.

Kathy McCranie, M.D., evaluated claimant's bilateral upper extremity and neck symptoms and performed electrodiagnostic nerve conduction (NC) studies on December 1, 2008. Dr. McCranie found the NC studies within normal limits, without evidence of carpal tunnel syndrome, neuropathy, or cervical radiculopathy.

Dr. Chris Updike referred claimant to Orthopedic Surgeon Mark Failinger, M.D., for an evaluation on December 18, 2008. Dr. Failinger reported the following history from claimant:

> Apparently on 10/27/2008 both arms started to hurt. She does a lot of scanning over and over for 9 years and it just started to hurt. **No injury at all.** She had pain in the forearms and discomfort. She continues to do that and it continues to hurt.

(Emphasis added). This history shows claimant continuing to ignore reporting the acute change in symptoms from the October 17th slip in the bathroom. Dr. Failinger recommended a work-up to determine whether claimant has a rheumatologic disorder. Dr. Failinger diagnosed rotator cuff tendonitis and referred claimant for a magnetic resonance imaging (MRI) scan of her right shoulder to rule out a tear.

Claimant underwent the right shoulder MRI on December 24, 2008. Dr. Failinger discussed the MRI with claimant on December 31st. Dr. Failinger noted the MRI revealed pathology involving the long head of the biceps tendon and some tendonitis of the supraspinatus. Dr. Failinger explained the degenerative condition of claimant's right shoulder:

> Over time [claimant] has slowly deteriorated at least the transverse ligament and some gradual deterioration of the subscapularis tendon that is allowing some mild subluxation of that biceps.

Dr. Failinger recommended arthroscopic surgery involving tenolysis and decompression of the subacromial space to relieve the tendonitis.

Claimant last worked for employer's microfilming unit on January 5, 2009. Employer transferred claimant to its fleet management unit, effective March 6, 2009. Claimant continues to believe she is unable to perform the microfilming work without experiencing symptoms. It is unclear whether claimant used techniques recommended by Therapist Hines to ameliorate muscle tension claimant associates with microfilming activity. Claimant believes she can perform duties in fleet management without experiencing her upper extremity symptoms.

On January 16, 2009, Dr. Chris Updike examined claimant and noted she was waiting for insurer to approve the surgery recommended by Dr. Failinger. On January 20, 2009,

Physiatrist Lynne A. Fernandez, M.D., reviewed claimant's medical records and Dr. Failinger's request to authorize surgery. Dr. Fernandez recommended insurer deny authorization; she reported:

> I do not find documentation explaining a shoulder injury as such as described being directly related to the patient's employment. It is my understanding she feeds forms into the machine; however, this is a **waist height with none or limited overhead reach**. I am not aware of a specific incidence related to her employment which would cause this particular injury.

(Emphasis added).

Dr. Chris Updike met with claimant on January 23, 2009, to discuss insurer's denial of authorization for surgery. Dr. Updike confirmed for claimant that insurer had denied liability. Dr. Updike reviewed claimant's medical records from Kaiser, specifically the October 25th record of Dr. Hernandez documenting the slip in the bathroom and his diagnosis of right rotator cuff tendonitis resulting from that accident. Dr. Hernandez's report however failed to indicate claimant's slip involved a restroom at work, as opposed to a bathroom at home. This uncertainty, coupled with inconsistencies in claimant's history where she variously attributed the onset of symptoms to the bathroom incident in her report to Dr. Hernandez and to microfilming activity in her reports to Concentra physicians, undermined claimant's reliability. Dr. Updike reported:

> [Claimant] was made aware that we have documented inconsistencies, and I doubt the denial by the insurance company would be overturned.
>
> ****
>
> [Claimant] was counseled that her diagnosis of rotator cuff tear remains the same, my recommendation for treatment remains the same, surgery, and **my recommendation for a different line of work**, remains the same.

(Emphasis added). Insurer formally denied authorization for surgery by letter of January 26, 2009.

Dr. Hernandez met with claimant on January 29, 2009, to discuss his report of October 25, 2008. Dr. Hernandez authored a letter clarifying his October 25th report; he wrote:

> When I saw [claimant on October 25th] she reported a small slip in the bathroom at work but my documentation did not reflect this. I do remember at the time that she did mention that accident did occur at a work restroom.

Dr. Hernandez opined that claimant's medical treatment should be addressed through workers' compensation because the accident in the restroom at work caused her need

for treatment. Dr. Hernandez's above-quoted letter supports claimant's testimony concerning the onset of increased right upper extremity symptoms following her slip in the restroom at work on October 17th. Crediting Dr. Hernandez's letter, the Judge finds claimant's testimony concerning her accidental slip in the bathroom at work reliable and credible.

When Dr. Chris Updike evaluated claimant on February 3, 2009, she presented him with the January 29th letter from Dr. Hernandez. Dr. Updike wrote:

> Given that the fall was not at home, and was in fact at work, and that, I do feel the repetitive nature of her job is adequate to cause this shoulder problem, In (sic) my opinion this case is work related, as originally presented by [claimant].

When he next saw claimant on February 12, 2009, Dr. Updike informed her that insurer was continuing to deny liability for the claim. Dr. Updike referred claimant to her PCP for further medical management and treatment.

Claimant sought medical treatment after February 12, 2009, though providers at Kaiser. Dr. Mason evaluated claimant on March 2, 2009, assessed right rotator cuff tendonitis, imposed light-duty restrictions, and referred her for physical therapy. Dr. Mason referred claimant to orthopedic physicians at Kaiser.

Kaiser Physician William H. Bentley, M.D., evaluated claimant on April 2, 2009, and recommended orthopedic follow up, noting most of claimant's complaints involved her shoulders. Dr. Bentley noted that a prior MRI of claimant's cervical spine ruled out impingement of spinal nerves. Dr. Bentley requested a copy of Dr. McCranie's NC studies for his review.

Kaiser Physician Richard Hathaway, M.D., evaluated claimant's complaints of bilateral shoulder achiness on April 6, 2009. Dr. Hathaway noted that claimant's right shoulder MRI showed impingement syndrome and mild acromioclavicular (AC) joint arthritis. Dr. Hathaway diagnosed bilateral shoulder impingement syndrome and bilateral AC joint arthritis. Dr. Hathaway injected both shoulders with medication that relieved her pain.

Claimant showed it more probably true than not that the slip in the restroom at work on October 17, 2008, proximately caused her need to seek medical attention and resulted in a disability. Although she developed aching pain in her bilateral upper extremities beginning in the spring of 2008, claimant managed those symptoms without seeking medical attention. Claimant did not seek medical attention for bilateral upper extremity and neck symptoms prior to the October 17th accident. After the slip in the restroom at work on October 17th, claimant's symptoms acutely changed, prompting her to seek medical attention. Crediting the medical opinions of Dr. Hernandez and Dr. Chris Updike, the Judge finds it medically probable that claimant's right shoulder trauma from the slip in the restroom at work caused her need to seek medical attention. Although claimant initially failed to inform the medical providers at Concentra of the history of her slip in the bathroom at work, claimant credibly explained that she attributed her symptoms to

her work activities because her symptoms began months before the acute change in symptoms after the slip in the restroom on October 17th. Claimant's authorized treating physicians imposed physical activity restrictions, which precluded claimant from performing her microfilming work. Because she was unable to perform her regular work, claimant sustained a disability. The October 17th accident resulted in a compensable injury because it required claimant to seek medical treatment and resulted in a disability.

Claimant showed it more probably true than not that the slip in the restroom at work on October 17, 2008, aggravated pathology in her right shoulder, but not in her neck and left shoulder. Claimant initially complained of bilateral upper extremity and neck symptoms; however, Dr. McCranie's diagnostic studies ruled out neuropathy of the bilateral upper extremities or cervical radiculopathy as symptom generators. Dr. Failinger confirmed by MRI and clinical examination that claimant's symptoms were associated with right shoulder pathology. Crediting Dr. Failinger's medical opinion, claimant's right shoulder pathology is degenerative, progressive, and developed over time. Claimant's right shoulder pathology thus is a preexisting, progressive disease process, which the slip in the restroom aggravated.

Claimant failed to show it more probably true than not that she sustained an occupational disease type injury involving her bilateral upper extremities and neck. Crediting her testimony, claimant developed aching pain in her bilateral upper extremities in the spring of 2008, which she associated with her microfilming activity at work. Crediting her testimony, claimant's microfilming activity aggravated symptoms of pain in her upper extremities and neck. Crediting the ergonomic evaluation by Therapist Hines, claimant's posture and positioning while performing those duties increased muscle tension in her upper extremities and neck. Claimant's testimony about aching pain was supported by the ergonomic evaluation by Therapist Hines. Therapist Hines also recommended how claimant could modify her posture to ameliorate muscle tension problems and future aggravation of her symptoms. Claimant was able to manage her symptoms without seeking medical attention until her symptoms acutely changed following her slip and fall in the restroom at work on October 17th. As found, claimant's accidental slip on October 17th proximately caused her to seek medical treatment and resulted in disability.

Claimant showed it more probably true than not that medical treatment and diagnostic testing provided by Concentra physicians, Dr. McCranie, Dr. Failinger, and other medical providers to whom these physicians referred claimant was reasonable and necessary to cure and relieve the effects of her accidental injury on October 17, 2008. Claimant showed it more probably true that arthroscopic surgery recommended by Dr. Failinger is reasonably necessary to cure and improve her right shoulder injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

A. Right Shoulder Injury Analysis:

Claimant argues she has proven by a preponderance of the evidence that she sustained a compensable right shoulder injury on October 17, 2008. The Judge agrees.

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that her injury arose out of the course and scope of her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

The Act distinguishes between the terms "accident" and "injury." The term "accident" refers to an unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), *supra*. By contrast, an "injury" refers to the physical trauma caused by the accident. Thus, an "accident" is the cause and an "injury" the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable injury. A compensable industrial accident is one, which results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

Here, the Judge found claimant showed it more probably true than not that the slip in the restroom at work on October 17, 2008, proximately caused her need to seek medical attention and resulted in a disability. Claimant thus proved by a preponderance of the evidence that she sustained a compensable right shoulder injury on October 17, 2008.

Although she developed aching pain in her bilateral upper extremities in the spring of 2008, claimant managed those symptoms without seeking medical attention. Claimant did not seek medical attention for bilateral upper extremity and neck symptoms prior to the October 17th accident. After the slip in the restroom at work on October 17th, claimant's symptoms acutely changed, prompting her to seek medical attention. Claimant's authorized treating physicians imposed physical activity restrictions, which precluded claimant from performing her microfilming work. The October 17th accident resulted in a compensable injury because it required claimant to seek medical treatment and resulted in a disability.

While claimant initially complained of bilateral upper extremity and neck symptoms, Dr. McCranie's diagnostic studies ruled out both neuropathy of the bilateral upper extremities and cervical radiculopathy as symptom generators. Dr. Failinger confirmed by MRI and clinical examination that claimant's symptoms were associated with right shoulder pathology. Crediting Dr. Failinger's medical opinion, claimant's right shoulder pathology is degenerative and developed over time. Claimant's right shoulder pathology thus is a preexisting, progressive disease process, which the slip in the restroom aggravated.

The Judge credited the medical opinions of Dr. Hernandez and Dr. Chris Updike in finding it medically probable that claimant's right shoulder trauma from the slip in the restroom at work caused her need to seek medical attention. Although claimant initially failed to inform the medical providers at Concentra of the history of her slip in the bathroom at work, claimant credibly explained that she attributed her symptoms to her work activities because her symptoms began months before the slip in the restroom on October 17th.

The Judge concludes insurer should provide claimant workers' compensation benefits under the Act for her compensable right shoulder injury.

B. Occupational Disease Analysis:

Claimant argues she has proven by a preponderance of the evidence that she sustained an occupational disease type injury involving her neck and bilateral upper extremities. The Judge disagrees.

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. (2002), as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, **and which can be fairly traced to the employment as a proximate cause and which does not come from a**

hazard to which the worker would have been equally exposed outside of the employment.

(Emphasis added).

This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Onset of disability is defined as the time when claimant's occupational disease either impairs his ability to effectively and properly perform his regular employment or renders him incapable of returning to work except in a restricted capacity. *See Ortiz v. Murphy*, 964 P.2d 595 (Colo. App. 1998).

The Judge found that claimant failed to show it more probably true than not that she sustained an occupational disease type injury involving her neck and bilateral upper extremities. Claimant thus failed to prove by a preponderance of the evidence that she sustained a compensable occupational disease.

As found, claimant developed aching pain in her bilateral upper extremities in the spring of 2008, which she associated with her microfilming activity at work. Claimant's microfilming activity aggravated symptoms of pain in her upper extremities and neck. Claimant's posture and positioning while performing microfilming duties increased muscle tension in her upper extremities and neck. Therapist Hines recommended how claimant could modify her posture to ameliorate muscle tension problems and future aggravation of her symptoms. Claimant was able to manage her symptoms without seeking medical attention until her symptoms acutely changed following her slip and fall in the restroom at work on October 17, 2008. The Judge found that claimant's accidental injury on October 17th, and not pain from her postural positioning while performing her microfilming duties, proximately caused her to seek medical treatment and resulted in disability.

The Judge concludes that claimant's claim for an occupational disease type injury arising out of her microfilming duties should be denied and dismissed.

C. Medical Benefits:

Claimant argues she has proven by a preponderance of the evidence that she is entitled to reasonable and necessary medical benefits. The Judge agrees.

Section 8-42-101(1)(a), *supra*, provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

Respondents thus are liable for authorized medical treatment reasonably necessary to cure and relieve the employee from the effects of the injury. Section 8-42-101, *supra*; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

The Judge found that claimant showed it more probably true than not that medical treatment and diagnostic testing provided by Concentra physicians, Dr. McCranie, Dr. Failinger, and other medical providers to whom these physicians referred claimant was reasonable and necessary to cure and relieve the effects of her accidental injury on October 17, 2008. The Judge further found that claimant showed it more probably true that arthroscopic surgery recommended by Dr. Failinger is reasonably necessary to cure and relieve her right shoulder injury.

The Judge concludes insurer should pay for past medical treatment provided by Concentra physicians, Dr. McCranie, Dr. Failinger, and other medical providers to whom these physicians referred claimant. The Judge further concludes insurer should pay for ongoing medical treatment, including arthroscopic surgery recommended by Dr. Failinger, that is reasonably necessary to cure and relieve claimant's right shoulder injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Insurer shall provide claimant workers' compensation benefits under the Act related to her compensable right shoulder injury.

2. Claimant's claim for an occupational disease type injury arising out of her microfilming duties is denied and dismissed.

3. Insurer shall pay for past medical treatment provided by Concentra physicians, Dr. McCranie, Dr. Failinger, and other medical providers to whom these physicians referred claimant.

4. Insurer shall pay for ongoing medical treatment, including arthroscopic surgery recommended by Dr. Failinger, that is reasonably necessary to cure and relieve claimant's right shoulder injury.

5. Issues not expressly decided herein are reserved to the parties for future determination.

DATED: May 13, 2009

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-756-669

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on, May 12, 2009 in Denver, Colorado. The hearing was digitally recorded (reference: 5/12/09, Courtroom 1, beginning at 1:30 PM, and ending at 2:00 PM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel. The same was submitted, electronically, on May 14, 2009. On the same date, Respondents indicated no objection to the proposed decision. The ALJ has modified the same and, as modified, hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern who are the dependents of the Deceased for the purpose of awarding death benefits.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Deceased sustained an admitted industrial injury in the course and scope of his employment with Employer on June 29, 2006, which resulted in his death.

2. The Deceased died on December 20, 2007. At the commencement of the hearing, Respondents made a judicial admission that the Deceased's death was a proximate result of his June 29, 2006 admitted industrial injury, and the ALJ so finds.

3. The parties stipulated to an average weekly wage (AWW) in the amount of $1,145.54, and that death benefits are subject to the maximum statutory compensation rate in effect on the date of Deceased's death. The maximum compensation rate on December 20, 2007 was $753.41, which the ALJ finds to be the weekly death benefit.

4. Dependent Claimant was awarded Social Security survivor's benefits in the monthly amount of $1,381, commencing December 2007. This equals $318.69 per week, one-half of which is $159.35. The parties stipulated to a weekly Social Security offset in the amount of $159.35, and a net death benefit compensation rate of $594.06 per week.

5. Dependent Claimant is the Deceased's natural daughter. Her date of birth is February 27, 2002. The Claimant's mother, Kendra Rasdall (aka Pandalis), was not married to the Deceased at the time of his injury or death. She was present at the hearing and is not claiming dependency or death benefits on account of the Deceased's death.

6. Dependent Claimant is presumed to be wholly dependent on the Deceased, pursuant to Section 8-41-501(1)(b), C.R.S. (2008). No evidence was presented that would rebut the statutory presumption of dependency. Therefore, the ALJ finds that the presumption has not been overcome and Dependent Claimant is wholly dependent on the Deceased.

7. The Deceased was not married at the time of his injury or death. He does not have any children other than the Claimant. Therefore, the ALJ finds that the Dependent Claimant has proven, by a preponderance of the evidence that she is the sole dependent entitled to death benefits pursuant to the Workers' Compensation Act. Accordingly, there is no need to apportion the benefits.

8. The preponderance of the evidence demonstrates that the Dependent Claimant is the natural child of the deceased. The Dependent Claimant's birth certificate lists the Deceased as her father. The Dependent Claimant's date of birth is February 27, 2002, and at present she is seven years of age. No evidence was presented that would rebut the presumption of dependency. Therefore, the ALJ finds that the Claimant was wholly dependent on the Deceased, and is entitled to death benefits until age eighteen, or until age twenty-one if she is a full-time student in an accredited school.

9. The Claimant's mother, Kendra Rasdall, is the representative payee for the Dependent Claimant's Social Security benefits. The ALJ determines that it is appropriate for Ms. Rasdall to be the payee for the Dependent Claimant's workers' compensation death benefits as well.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. Claimants have the burden of proof, by a preponderance of the evidence, of establishing the compensability of a fatality and entitlement to death benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Dependent Claimant has sustained her burden.

b. Section 8-42-115(1)(b), C.R.S. (2008), provides that death benefits are payable to the dependents of a deceased worker whose death was a proximate result of an industrial injury. A judicial admission is defined as a "formal, deliberate declaration that a party or his or her counsel makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or facts about which there is no real dispute." *Kempter v. Hurd,* 713 P.2d 1274 (Colo. App. 1986). Judicial admissions must be unequivocal but become binding once they are made. *Salazar v. American Sterilizer Co.,* 5 P.3d 357 (Colo. App. 2000). *Also see Valdez v. Texas Roadhouse,* W.C. No. 4-366-133 [Industrial Claim Appeals Office (ICAO), January 25, 2001]. As found, Respondents made a judicial admission that compensability of the fatality is established in this case.

c. Section 8-41-503(1), C.R.S. (2008), provides that dependents and the extent of dependency shall be determined "as of the date of the injury to the injured employee, and the right to death benefits shall become fixed as of said date irrespective of any subsequent change." Furthermore, Section 8-41-501(1)(b),(c), provides that minor children of the deceased under the age of eighteen are presumed wholly dependent, and children between eighteen and twenty-one years of age are presumed wholly dependent as long as they are engaged in courses of study as full-time students in an accredited school. As found, the Dependent Claimant is whooly dependent on the Deceased.

d. Pursuant to Section 8-42-114, C.R.S. (2008), the dependents of a deceased employee shall receive compensation in the amount of two-thirds of the employee's AWW, not to exceed ninety-one percent of the state AWW. As found, the parties stipulated to an AWW in the amount of $1,145.54, and that death benefits are subject to the maximum statutory compensation rate in effect on the date of the Deceased's death. *See Richards v. Richards & Richards*, 664 P.2d 254 (Colo. App. 1983) [under rule

of independence, dependent's benefits subject to maximum compensation rate at time of the worker's death]. The maximum compensation rate on December 20, 2007 was $753.41.

e. Respondents are entitled to offset Social Security survivor's benefits payable to the Claimant. Section 8-42-114, C.R.S. (2008). The Dependent Claimant was awarded Social Security survivor's benefits effective December 2007, with an initial entitlement amount of $1,381 per month. Respondents will be entitled to the statutory offset, pursuant to Section 8-42-103(1)(c), C.R.S. (2008). The offset amount is limited to 50% of the initial entitlement award, without increases for cost-of-living adjustments (COLAs) in the Social Security survivor's benefits, pursuant to *Englebrecht v. Hartford Acc. & Indem. Co.*, 680 P.2d 231 (Colo. 1984). As found, pursuant to the stipulation of the parties, the Dependent Claimant is entitled to a net death benefit of $594.06 per week, after subtracting the applicable offset.

f. The Dependent Claimant was the Deceased's only child. He was not married on the date of his injury or at the time of his death. As found, there are no other dependents. Therefore, the Dependent Claimant is entitled to 100% of the death benefits payable on this claim, without apportionment.

g. Section 8-42-122, C.R.S. (2008), provides that in cases where the dependents are minor children "[t]he director [or ALJ], for the purposes of protecting the rights and interests of any dependents whom the director deems incapable of fully protecting their own interests … may otherwise provide for the manner and method of safeguarding the payments due such dependents in such manner as the director [or ALJ] sees fit." The ALJ concludes that the death benefits should be paid to Kendra Rasdall, Dependent Claimant's natural mother, for the Dependent Claimant's benefit. Ms. Rasdall is the Claimant's full-time custodial parent. The ALJ concludes that Ms. Rasdall will have the best interests of the Dependent Claimant at heart, and is willing and able to apply the benefits in accordance with the best interests of the Dependent Claimant.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Dependent Claimant is the sole dependent of the Deceased and Respondents shall therefore pay Dependent Claimant 100% of the dependent's death benefits without apportionment.

B. Respondents shall pay the Dependent Claimant death benefits in the net amount of $594.06 per week, commencing December 20, 2007 and continuing thereafter until terminated according to law.

C. The death benefits shall be paid to Kendra Rasdall, as trustee payee, and shall be applied for the benefit of the Dependent Claimant.

D. Respondents shall pay the dependent Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

DATED this_____day of May 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-526-049

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr. Administrative Law Judge (ALJ), on May 5, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 5/05/09, Courtroom 3, beginning at 3:15 PM, and ending at 4:10 PM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel, to be submitted electronically, giving Respondents 3 days after receipt thereof within which to file objections, electronically. The proposed decision was filed on May 13, 2009. No timely objections were filed. After a consideration of the proposal , the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns whether the Claimant is entitled to ongoing treatment after maximum medical improvement (MMI), as recommended by Jonathan Woodcock, M.D., an authorized treating physician (ATP). Specifically, the parties stipulated that the issue is narrowed to whether the treatment recommendations of Dr. Woodcock are causally related to the original compensable injury of August 2, 2001, and whether the recommended treatment constitutes reasonably necessary medical maintenance care as defined in *Grover vs. Industrial Commission,* 759 P.2d 705,711 (Colo. 1988).

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. It was stipulated, and the ALJ finds, that both Dr. Woodcock and John Kemp, M.D., have at all times been authorized.

2. Dr. Woodcock, in his report dated February 6, 2009, states " It appears clear that these residual right shoulder problems are a result only of the August, 2001 Workers' Compensation injury and require further maintenance treatment." Dr. Woodcock also stated " I would recommend that she [Claimant] be referred to Panorama Orthopedics or another shoulder specialty orthopedic surgeon for further evaluation under her Workers' Compensation coverage." The ALJ finds that Dr. Woodcock is a qualified expert in this regard, his opinion is based on reliable scientific principles, it is relevant, it is useful for a determination of the ultimate issues herein, it is rendered to a reasonable degree of medical probability, and it is essentially un-disputed. Also, Dr. Woodcock's referral to Panorama Orthopedics and Dr. Kemp was within the normal progression of authorized treatment.

3. At the hearing, the Claimant described the worsening of her symptoms and physical impairment of her right shoulder. She stated that since her treatment was terminated with Dr. Woodcock's office in approximately March 2006 her condition has steadily worsened. She denies any other accidental injuries or other activity that could have aggravated her condition. The ALJ finds this testimony credible, essentially undisputed, and Dr. Woodcock's opinion corroborates it on the issue of causal relatedness.

4. The Supplemental Order of ALJ Bruce C. Friend, dated March 4, 2008, ordered: "The insurer remains liable for reasonable and necessary medical treatment related to the injury. Any request for payment for medical treatment is subject to challenge as unrelated to the industrial injury."

5. The ALJ finds that the opinions of Dr. Woodcock are persuasive, credible and controlling herein. The ALJ finds that the Claimant's residual right shoulder problems are the result of the August 2001 compensable injury, and they require further maintenance treatment as recommended by Dr. Woodcock.

6. The Claimant has proven, by a preponderance of the evidence that she requires post-MMI maintenance medical care, and that this care is causally related to the compensable injury of August 8, 2001 and reasonably necessary to maintain the Claimant at her plateau of MMI.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. In Colorado, Rule 702, CRE (Colorado Rules of Evidence), governs a determination as to whether scientific or other expert testimony should be admitted. A tribunal should make an inquiry focusing on the relevance and reliability of the proffered evidence, making a determination as to (1) the reliability of the scientific principles, (2) the qualifications of the witness, and (3) the usefulness of the testimony. *See People v. Ramirez*, 155 P.3d 371 (Colo. 2007); *People v. Shreck,* 22 P. 3d 68 (Colo. 2001); *Daubert v. Merrill Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S. Ct. 2786,125 L. Ed. 2d 469 (1993). *See also Abad v. Dynalectric,* W.C. No. 4-513-389 [Industrial Claim Appeals Office (ICAO), March 17, 2003]. As found, Dr. Woodcock's opinions concerning the causal relatedness the worsening of the Claimant's right shoulder meets all of the *Ramirez* and *Schreck* criteria.

b. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, Dr. Woodcock's opinions on reasonable necessity and causal relatedness are essentially un-contradicted. As further found, Dr. Woodcock's medical opinions herein are controlling. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard uncontradicted testimony. As also found, Claimant's testimony was credible and essentially undisputed.

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing a worsening of condition and entitlement to additional benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts,

more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has sustained her burden with respect to the causal relatedness, and reasonable necessity of the post-MMI medical treatment recommended by Dr. Woodcock.

d. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury in terms of maintaing the injured worker at MMI. *See Grover v. Industrial Commission of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Industrial Commission, supra*. Such evidence, at a minimum, may take the form of a prescription, or a recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Industrial Claim Appeals Office, supra*. An injured worker is entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity, at any time. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). As found, Claimant is entitled to the maintenance medical care recommended by her ATP, Dr. Woodcock, which is reasonably necessary to maintain her at the plateau of MMI.

e. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Industrial Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, Dr. Woodcock's referral to Panorama Orthopedics and Dr. Kemp was within the normal progression of authorized treatment.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of all authorized and reasonably necessary, post-maximum medical improvement maintenance medical care for the Claimant's right shoulder, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Jonathan Woodcock, M.D., remains an authorized treating physician.

C. Respondents are liable for ongoing treatment under the care of Dr. Woodcock, as well as Dr. Woodcock's referral to Panorama Orthopedic Clinic or any other physician referral made by Dr. Woodcock, necessary to maintain the Claimant at maximum medical improvement.

D. Respondents shall remain liable for all medical benefits as provided by statute, including reimbursement for mileage, medications and other out of pocket medical expenses.

E. Any and all issues not determined herein are reserved for future decision.

DATED this _____ day of May 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-592-900

ISSUES

1. The issues for hearing on March 3, 2009 in Colorado Springs, Colorado were permanent total disability ("PTD") benefits and application of offsets.

FINDINGS OF FACT

1. Claimant was first hurt on August 7, 2002. He was treated and put at MMI on March 1, 2004, with a ten percent whole-person impairment rating.

2. He went back to work for the employer in a light-duty position (limited to lifting 20 pounds, as opposed to 75 – 100 pounds he had lifted previously), but gradually his medical condition worsened and he opted for surgery. The claim was reopened by order of ALJ Stuber dated August 23, 2006, and Respondents were ordered to pay for a lumbar fusion recommended by Roger Sung, M.D.

3. On January 23, 2007, Claimant underwent a two-level anterior lumbar discectomy and fusion, with insertion of interbody cages and anterior lumbar plating at L4-5 and L5-S1. Claimant was released from the hospital and a few days later on January 27, 2007, he went back to the emergency room, with leg pain, numbness and weakness. He was found to have acute and critical ischemia of the right lower extremity, with "complete occlusion of the right lower extremity arterial anatomy" and acute and subcritical ischemia of the left lower extremity. On January 29, 2007, he underwent thromboembolectomies of both legs, with removal of "very long solid snakes of acute/

subacute thrombus." It was noted that there was no flexion or extension at the right ankle "due to the bow-string effect of muscles at both the anterior and posterior compartments." Therefore, to relieve the pressure, four-compartment fasciotomies of the right leg were performed by three additional incisions, measuring 12, 10 and 5 centimeters. Two days later, another thromboembolectomy was performed on the right leg, but the leg was noted to be "severely threatened." He also underwent serial debridement of necrotic muscle. Finally, on or about February 21, 2007, the right leg was amputated above the knee because, due to extensive loss of muscle.

4. After his hospitalization, he was sent to the HealthSouth rehabilitation facility. When he had been released, Claimant's care was resumed by Michael Sparr, M.D., who saw him on March 22, 2007. Dr. Sparr noted stump irritation and back pain, attributed to "abnormal gait pattern and myofascial imbalance within the gluteal and lumbosacral musculature." The back pain continued to be a problem, and he soon developed left knee pain, first noted on May 3, 2007, less than three months after the amputation and which steadily increased. An MRI was ordered, which showed a new meniscal tear, which Dr. Sparr attributed to abnormal gait. On June 21, 2007, Dr. Sparr referred Claimant to an orthopedic surgeon, noting, "It is important that the patient's left knee is strong and reliable, given the potential instability of the contralateral [prosthetic] knee."

5. On August 10, 2007, Respondents had Claimant examined by Michael Hewitt, M.D., an orthopedic surgeon. Dr. Hewitt noted that Claimant complained of increasing pain over the prior two or three months. Dr. Hewitt noted that the report from the MRI on June 14, 2007, noted "an acute versus healing horizontal tear of the posterior horn of the medial meniscus with moderate chondromalacia of the trochlea and a moderate to large joint effusion as well as a moderate sized Baker cyst." Dr. Hewitt concluded that "it would be medically reasonable to attribute his [left knee] symptoms to ambulating on a single leg as he has rehabilitated from his contralateral above-the-knee amputation," and felt that arthroscopic surgery could be considered.

6. Michael Sparr, M.D., Claimant's primary treating doctor, stated in a report dated August 7, 2008, "Certainly [knee] surgery can be considered, but in my opinion only if his knee is more increasingly unstable or near constantly painful."

7. Dr. Sparr rendered a 52 percent whole-person impairment rating on May 30, 2008, with impairment to the lumbosacral spine, right above-the-knee amputation, and "left knee meniscal tear secondary to chronically abnormal gait pattern secondary to amputation."

8. Claimant underwent a Functional Capacity Evaluation at Village Therapy on May 16, 2008. The evaluation was determined reliable, both by objective tests tallied by the software and the evaluator's assessment. Dynamic lifting ability was measured at 20 to 25 pounds (the latter at waist and shoulder height). Restrictions included:

> Patient displayed constant level sitting tolerance with breaks from sitting posture every 30 minutes.

> Patient displayed frequent walking/standing tolerance, 10-15 minutes at a time and 20-30 minutes maximum in any one hour time period.
>
> Patient reported a previous heavy lifting/carrying job demand. On this date he displayed lifting/carrying capabilities in the light range.
>
> "Light" lifting was defined as 20 pounds occasionally (up to 1/3 of the day) and 10 pounds frequently (up to 2/3 of the day). Dr. Sparr signed off on the permanent restrictions.

9. Claimant still has significant back pain after the two-level fusion surgery. He reported back pain in March, April, and May 2007, before receiving his prosthetic leg. On June 21, 2007, he was still tender to palpation over the gluteal musculature and over the quadratus lumborum muscles, for which aggressive physical therapy was prescribed. His gait pattern had improved by September 13, 2007, but he was having gluteal pain and sacroiliitis, along with pelvic asymmetry. Persistent lumbosacral pain was noted in October and November 2007, and three visits in January 2008, treated with physical therapy, a muscle stimulator unit, and trigger point injections. After the Functional Capacity Evaluation, Claimant returned to Dr. Sparr on June 17, 2008, complaining of "gradually increasing left-sided buttock pain following the functional capacity evaluation to the point now where he has difficulty walking for more than 100 yards and rolling over in bed." This was diagnosed as "acute sacroiliac strain following the functional capacity evaluation which is treated in the context of maintenance. His abnormal gait pattern, possibly from developing the recent boil, has contributed and now there is significant gluteal muscle imbalance and some trochanteric bursitis." He was treated with injections into the affected muscles and bursa and referred for more physical therapy. By July 1, 2008, he reported a significant decrease in pain, so that he was able to walk 10 minutes without hip pain. He was seen on July 22 and August 7, 2008, where he reported his back pain had improved with physical therapy. He reported increased pain on September 9, 2008, after Dr. Lesnak's examination. On December 9, 2008, he complained of back pain, worse in cold weather.

10. The ALJ concludes that the surveillance video of Claimant is of negligible probative value.

CONCLUSIONS OF LAW

1. Claimant alleges that he is permanently and totally disabled, and therefore "has the burden to prove PTD by demonstrating that he is unable to earn 'any wages' in the same or other employment." *Galvan v. Schmidt Imports, Inc.*, 2005 WL 977621, W.C. Nos. 4-385-985 and 4-496-578 (I.C.A.O. April 18, 2005). The crux of the test to determine if a claimant is permanently and totally disabled is whether employment exists that is reasonably available to the claimant under his or her circumstances. *Joslins Dry Goods Co. v. I.C.A.O.*, 21 P.3d 866 (Colo. App. 2001). Permanent total disability benefits are awarded to an employee who is unable to earn any wages in their local labor market. The Colorado Court of Appeals held that "any wages" means any wages

greater than zero. *McKinney v. ICAO,* 894 P.2d 42 (Colo. App. 1995). PTD determinations must also consider "the general physical condition and mental training ability, former employment, and education of the injured employee." *Bestway Concrete v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

2. The Colorado Supreme Court has held that access to employment in a commutable labor market in the area where the claimant resides, as well as other "human factors," can be considered in determining PTD. *Weld Co. School Dist. RE 12 v. Bymer,* 955 P.2d 550 (Colo. 1998). To find that an employer is liable for PTD benefits, "it must be shown that there is a direct causal relationship between the industrial injury and the PTD." *Joslins Dry Goods Co. v. ICAO*, 21 P.3d 866, 869 (Colo. App. 2001).

3. In this case, Claimant's own history is that he previously worked as a dishwasher at a diner in Connecticut, recapped tires, and thereafter worked at a Sheraton Hotel where he was the chief steward and sometimes supervised other dishwashing staff. After working at the hotel, he worked at Western Forge. Claimant's first language is Spanish, although he has taught himself to read and speak minimal English. He lives in Colorado Springs, with access to a large commutable labor market. Also, Claimant is 51 years old with a life expectancy of 29 years. C.R.S. § 13-25-103.

4. Based upon a totality of the circumstances including Claimant's human factors of limited education, limited language skills, poor math skills, prior jobs being physically demanding, minimal transferable skills, the ALJ concludes that Claimant cannot earn any wage as defined in § 8-40-201(16.5)(a), C.R.S.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant permanent disability benefits in accordance with the Workers' Compensation Act of Colorado.

2. The parties stipulated to the application of Social Security Disability Insurance offset to be applied from the date of Claimant's award. The parties agreed to resolve the particulars of the issue in good faith once all of the information is available.

3. Respondents shall pay statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

4. Any and all issues not determined herein are reserved for future decision.

DATE: May 18, 2009
/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-633-192

ISSUE

The issue of average weekly wage (AWW) was raised for consideration at hearing.

FINDINGS OF FACT

Having considered the evidence presented at hearing and the parties' post hearing position statements, the following Finding of Facts are entered.

1. Claimant suffered an admitted work injury on October 30, 2003 in a slip and fall accident, where he injured his low back.

2. Claimant operated an insurance brokerage at the time of the injury in 2003. Claimant employed two and one half persons in 2003 and he obtained workers' compensation insurance coverage for himself and his employees. In 2007, Claimant sold his insurance business and was hired by the company to which he sold his company.

3. The parties stipulated that Claimant provided documentation to the Insurer that he was earning an AWW of $615.39 on the date of the accident, October 30, 2003. This represents a yearly salary of approximately $30,000.

4. Claimant received temporary total disability benefits in 2005 after a surgery, for a brief period of time from April to July 2005. At that time, he did not request an alteration of the AWW.

5. Claimant established through the credible evidence presented at hearing that his current yearly salary is approximately $99,000 based upon 2008 wages, when he reached maximum medical improvement. According to the Final Admission of Liability, Claimant reached maximum medical improvement (MMI) on July 29, 2008.

6. Insurer's claims representative, Debra Lockrem, of the Wisconsin office, testified at the hearing that she based the temporary and permanent disability benefits on the AWW earned at the time of the injury, pursuant to Section 8-42-102(2), C.R.S. She testified that she has never changed any claimant's AWW to reflect an increase or decrease in salary when he/she reaches MMI.

7. Catherine Harris, Commercial Operations Services Technician for Colorado for the Insurer also testified. She confirmed that she was personally aware of the insurance policy issued to the Employer and how the premium was calculated for underwriting purposes. She testified that the premium charged the Employer in 2003 was based upon the salaries reported by the Employer. Those salaries were audited on a yearly basis to insure the premiums reflected the risk assumed by the insurer and any payroll changes. Thus, the premium for the policy in effect on October 30, 2003 was based upon the Claimant's reported salary in 2003.

8. Claimant testified credibly at hearing that his back injury is getting worse. He further testified credibly that he now takes off Wednesdays because of the work injury. He testified that he might go part time in the future in order to accommodate the back injury.

CONCLUSIONS OF LAW

Having made the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leaves the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

2. A Workers' Compensation case is decided on its merits. Section 8-43-201, supra. The facts in a Workers' Compensation case must be interpreted neutrally, neither in favor or the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, supra. The judge's factual findings concern only the evidence and inferences that are found to be dispositive of the issues involved that; that the judge has not addressed every piece of evidence and every inference that might lead to conflicting conclusions and has rejected evidence and inferences contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v Industrial Claims Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. In this case, Claimant contends that his AWW should be increased consistent with his salary at the time of maximum medical improvement instead of his salary at the date of injury. Claimant contends that the increased AWW more accurately and fairly reflects his wage. Practically, it also will cause his permanent partial disability benefits to be paid at a higher rate.

4. Respondents argue that Claimant's request to increase his AWW should be denied. Respondents maintain that an increase in Claimant's AWW is unwarranted. Respondents further maintain that Claimant's permanent partial disability benefits should be paid on the basis of his AWW as determined at the time of his injury. Respondents contend that the facts of this case can be distinguished from the facts in the case of *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589 (CO 2008) because this case is not based on Claimant's Petition to Reopen based on a worsened condition.

5. Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under some circumstances, the ALJ may determine a claimant's permanent partial disability rate based upon earnings the claimant received on a date other than the date of injury. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo.

App. 1993). Section 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Avalanche Industries, Inc. v. Clark*, *supra*. The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7,* W.C. No. 4-240-475 (ICAO May 7, 1997). Where a claimant's earnings increase periodically his AWW may be calculated based upon earnings during a given period of disability, not the earnings on the date of the original injury. *Avalanche Industries, Inc. v. Clark, supra; Campbell v. IBM Corp., supra*.

6. The ALJ in *Avalanche Industries, supra,* noted that the claimant's claim had been reopened" and a new period of temporary total had to be considered. In that case, the claimant's indemnity benefits were tied to a new and higher AWW. The ALJ contrasts this with the situation presented in the case at bar. Claimant only received temporary total disability benefits in 2005 after his surgery, for a brief period between April and July 2005. At that time, he did not request an alteration of the AWW.

7. The ALJ is charged to determine what is fair under each set of circumstances. *Campbell v. IBM Corp., supra.* Here, Claimant does not seem to have a demonstrable diminution in earning power over the years he has been in the workers' compensation system. In fact, his yearly salary has basically tripled to almost $99,000 in 2008 when he reached MMI. Claimant did not seek increased AWW in 2005 when he received TTD.

8. Considering all the relevant circumstances, the ALJ concludes that there is no compelling reason to recalculate AWW in variance from the general rule found at Section 8-42-102(2), C.R.S. which directs that AWW is based on wages received "at the time of the injury."

9. The ALJ concludes that, under the circumstances of this case, the AWW is appropriate as admitted in the General and Final Admissions of Liability filed by the Respondents.

ORDER

It is therefore ordered that:

Claimant's claim for increased AWW is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED: May 26, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-636-107

ISSUES

1. Whether Respondents correctly paid Claimant indemnity benefits and are entitled to recover an overpayment in the amount of $546.14.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to recover penalties for Respondents' failure to correctly pay indemnity benefits.

FINDINGS OF FACT

1. On December 8, 2004 Claimant sustained an admitted industrial injury to her right shoulder during the course and scope of her employment with Employer.

2. At various times during the course of her treatment Claimant received periods of Temporary Total Disability (TTD) and Temporary Partial Disability (TPD) benefits. Claimant reached Maximum Medical Improvement (MMI) on two occasions and underwent two Division Independent Medical Examinations (DIME's).

3. On September 14, 2007 Claimant ultimately reached MMI. On January 28, 2008 DIME physician Dr. James Lindberg agreed that Claimant had reached MMI.

4. On March 4, 2008 Respondents filed a Final Admission of Liability based on Dr. Lindberg's DIME report. The FAL noted an overpayment of $4,979.89.

5. Claimant timely objected to the FAL. She sought a hearing on whether she was permanently and totally disabled and whether her extremity impairment rating should be converted to a whole person rating. The hearing was conducted on October 7, 2008 before ALJ Krumreich.

6. On October 23, 2008 ALJ Krumreich issued a Summary Order. The Order concluded that Claimant was not entitled to permanent total disability benefits but that her extremity impairment rating should be converted to a whole person rating. The Summary Order noted, "Respondents are entitled to credit for all amounts of permanent partial benefits previously paid pursuant to the Final Admission of March 4, 2008." ALJ Krumreich subsequently issued Findings of Fact, Conclusions of Law and Order that contained identical language regarding Respondents' entitlement to credit for previously paid Permanent Partial Disability (PPD) benefits.

7. On November 14, 2008 Respondents filed a FAL consistent with ALJ Krumreich's determination. The FAL reflected a 14% whole person impairment rating

with a total value of $25,446.05. The FAL also noted an overpayment of $13,363.81. Accordingly, the remaining balance of PPD benefits to be paid was $12,082.24.

8. On November 14, 2008 Respondents paid Claimant a lump sum award in the amount of $9,617.11. The lump sum award covered PPD benefits for the period February 26, 2008 through November 20, 2008. Respondents also instituted regular PPD payments.

9. On December 2, 2008 Respondents paid Claimant disfigurement benefits in the amount of $800.00 pursuant to a November 20, 2008 Order.

10. Based on Claimant's concerns, Respondents recalculated the figures in the November 14, 2008 FAL by reviewing a payment log reflecting the actual benefits disbursed to Claimant. Respondents thus issued a new FAL on March 6, 2009. The new FAL detailed the different types of indemnity benefits Claimant had received and the calculation of an overpayment amount. The March 6, 2009 FAL specified that Claimant had received an overpayment in the amount of $546.14.

11. The Division of Workers' Compensation (DOWC) sent an error letter to Insurer regarding the March 6, 2009 FAL. Although there were two calculation errors in the FAL, the indemnity benefits and overpayment amount were not affected. After correcting the calculation errors, Insurer filed a new FAL on March 20, 2009 reflecting an overpayment of $546.14. Insurer did not receive any additional error letters.

12. Insurer's Claims Representative Helen Sullivan testified at the hearing in this matter. She explained Claimant's indemnity benefits and overpayment calculations. Ms. Sullivan credibly stated that the only method to accurately calculate Claimant's benefits was to review the actual payments that had been made. She then compared the payments to the benefits that Insurer owed on the claim.

13. Insurer's payment log reflects PPD payments of $16,319.32. Subtracting $800.00 for Claimant's disfigurement award reveals total PPD benefits paid in the amount of $15,519.32. The TTD and TPD benefits paid to Claimant totaled $44,682.26. Adding the total PPD benefits to the total TTD and TPD benefits equals indemnity payments to Claimant of $60,201.58. Based on the value of Claimant's claim, Insurer owed Claimant TTD and TPD benefits in the amount of $34,209.39 and PPD benefits of $25,446.05. The amount owed on the claim thus totaled $59,655.44. Insurer credited the overpayment of TTD and TPD benefits in the amount of $10,472.87 to Claimant's PPD benefits. Because Insurer actually paid Claimant $60,201.58 but only owed $59,655.44, Insurer overpaid Claimant indemnity benefits in the amount of $546.14.

14. Claimant asserts that Respondents are precluded from recovering any overpayment of indemnity benefits based on ALJ Krumreich's Order. However, Respondents have consistently maintained that Claimant had received an overpayment of indemnity benefits and filed multiple FAL's in order to properly address any calculation concerns. ALJ Krumreich merely issued an Order concluding that Claimant's extremity impairment rating should be converted to a whole person rating and noted that Re-

spondents were entitled to credit for all amounts of PPD benefits paid pursuant to the March 4, 2008 FAL. ALJ Krumreich's Order thus did not preclude Respondents from recovering an overpayment.

15. On November 14, 2008 Respondents filed an FAL consistent with ALJ Krumreich's determination and noted that Claimant had received an overpayment of benefits. Based on Claimant's concerns, Respondents recalculated the figures in the November 14, 2008 FAL by reviewing a payment log that reflected the actual benefits disbursed to Claimant. Respondent then issued a new FAL on March 6, 2009 detailing the different types of benefits Claimant received and the calculation of the overpayment figures. The March 6, 2009 FAL concluded that Claimant had received an overpayment in the amount of $546.14. A March 20, 2009 FAL corrected calculation errors but the ultimate benefits and overpayment figures were not affected. Ms. Sullivan credibly explained that the only method to accurately calculate Claimant's benefits was to review the actual payments that had been made to Claimant and compare the amounts to the benefits owed. Adding PPD benefits to TTD and TPD benefits equaled total indemnity payments to Claimant of $60,201.58. In contrast, Respondent owed Claimant a total of $59,655.44 on the claim. Respondents have thus demonstrated that it is more probably true than not that they are entitled to recover an overpayment of indemnity benefits in the amount of $546.14 from Claimant.

16. Claimant has failed to establish that it is more probably true than not that she is entitled to recover penalties for Respondents' failure to correctly pay PPD benefits. Respondents thus have not violated a statute, rule or lawful order of an ALJ. Accordingly, Claimant is not entitled to recover penalties.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. An "overpayment" includes money received by a claimant that exceeds the amount that should have been paid or that the claimant was not entitled to receive. §8-40-201(15.5), C.R.S. Respondents have the burden of proving an entitlement to recover an overpayment. *Rocky Mountain Cardiology v. ICAO,* 94 P.3d 1182, 1186 (Colo. App. 2004). In 1997 the General Assembly amended §8-43-303 to permit reopening on the basis of "fraud" or "overpayment." *In Re Simpson,* W.C. No. 4-467-097 (ICAP, Aug. 8, 2007). Moreover, the statute provides that reopening may not "affect moneys already paid except in cases of fraud or overpayment." *Id.* Consequently, the statute contemplates that in cases involving an overpayment, the ALJ "has authority to remedy the situation." *In Re Moran-Butler,* W.C. No. 4-424-488 (ICAP, Aug. 21, 2008); *In Re Simpson,* W.C. No. 4-467-097 (ICAP, Aug. 8, 2007).

5. As found, Claimant asserts that Respondents are precluded from recovering any overpayment of indemnity benefits based on ALJ Krumreich's Order. However, Respondents have consistently maintained that Claimant had received an overpayment of indemnity benefits and filed multiple FAL's in order to properly address any calculation concerns. ALJ Krumreich merely issued an Order concluding that Claimant's extremity impairment rating should be converted to a whole person rating and noted that Respondents were entitled to credit for all amounts of PPD benefits paid pursuant to the March 4, 2008 FAL. ALJ Krumreich's Order thus did not preclude Respondents from recovering an overpayment.

6. As found, on November 14, 2008 Respondents filed an FAL consistent with ALJ Krumreich's determination and noted that Claimant had received an overpayment of benefits. Based on Claimant's concerns, Respondents recalculated the figures in the November 14, 2008 FAL by reviewing a payment log that reflected the actual benefits disbursed to Claimant. Respondent then issued a new FAL on March 6, 2009 detailing the different types of benefits Claimant received and the calculation of the overpayment figures. The March 6, 2009 FAL concluded that Claimant had received an overpayment in the amount of $546.14. A March 20, 2009 FAL corrected calculation errors but the ultimate benefits and overpayment figures were not affected. Ms. Sullivan credibly explained that the only method to accurately calculate Claimant's benefits was to review the actual payments that had been made to Claimant and compare the amounts to the benefits owed. Adding PPD benefits to TTD and TPD benefits equaled total indemnity payments to Claimant of $60,201.58. In contrast, Respondent owed Claimant a total of $59,655.44 on the claim. Respondents have thus demonstrated by a preponderance of the evidence that they are entitled to recover an overpayment of indemnity benefits in the amount of $546.14 from Claimant.

Penalties

7. Section 8-43-304(1), C.R.S. is a general penalty provision under the Act that authorizes the imposition of penalties up to $500 per day where a party violates a statute, rule, or lawful order of an ALJ. *Holliday v. Bestop, Inc.,* 23 P.3d 700, 705, 706 (Colo. 2001). The imposition of penalties under §8-43-304(1) requires a two-step analysis. *See In re Hailemichael,* W.C. No. 4-382-985 (ICAP Nov. 17, 2004). The ALJ must first determine whether the disputed conduct violated a provision of the Act or rule. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623, 624 (Colo. App. 1995). If a violation has occurred, penalties may only be imposed if the ALJ concludes that the violation was objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 907 P.2d 676, 678-79 (Colo. App. 1995). The reasonableness of an insurer's actions depends upon whether the action was predicated on a "rational argument based on law or fact." *In re Lamutt,* W.C. No. 4-282-825 (ICAP, Nov. 6, 1998).

8. As found, Claimant has failed to establish by a preponderance of the evidence that she is entitled to recover penalties for Respondents' failure to correctly pay PPD benefits. Respondents thus have not violated a statute, rule or lawful order of an ALJ. Accordingly, Claimant is not entitled to recover penalties.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents may recover an overpayment of indemnity benefits in the amount of $546.14 from Claimant.

2. Claimant's request for penalties is denied and dismissed.

3. Any issues not resolved in this Order are reserved for future determination.

DATED: May 28, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-682-507

ISSUES

The issues to be determined at hearing included Claimant's request for a general order of maintenance medical care and Claimant's request for a change of authorized treating physician to provide maintenance medical care from Dr. Stagg to Dr. Price.

FINDINGS OF FACT

1. Claimant is a wellness instructor for employer. Claimant has been employed with employer for eleven (11) years. Claimant suffered an admitted injury to her left lower extremity on December 27, 2005 while leading an aerobics class. Claimant was referred for treatment with Dr. Duke at St. Mary's Occupational Health. Claimant reported to Dr. Duke that she felt a popping sensation as she was coming back down after jumping onto her left foot. Claimant described the popping sensation as occurring in the plantar aspect of her left foot under the heel. Dr. Duke performed x-rays that were negative. Dr. Duke provided Claimant with work restrictions, placed Claimant into a cam walker boot and instructed to return in 2-3 days for reevaluation.

2. Claimant continued to treat with Dr. Duke until January 9, 2006, when Dr. Stagg, who was in the same practice as Dr. Duke, took over her care. Claimant reported to Dr. Stagg that the swelling associated with her foot would come and go. Dr. Stagg diagnosed Claimant as suffering from plantar fasciitis and continued Claimant's work restrictions. On Claimant's next evaluation with Dr. Stagg on January 23, 2006, Claimant continued to complain of a significant amount of pain in the posterior aspect of her foot. Based on Claimant's continued complaints of pain, Dr. Stagg referred the Claimant for an MRI study of her left foot to rule out a posterior tibial tendon injury. Based upon the results of the MRI study, Dr. Stagg recommended a CT scan of the left foot. According to Dr. Stagg, the CT scan showed multiple in situ fragments of the medial talar dome lesion, which were concerning for unstable fragments. Dr. Stagg also noted on February 6, 2006, Claimant had complaints of pain in the ankle since the injury, but had not really reported these complaints. Based on the CT scan, Dr. Stagg diagnosed a probable chondral fracture of the talar dome and referred the Claimant for an orthopedic evaluation with Dr. Copeland.

3. Claimant was evaluated by Dr. Copeland on February 7, 2006 with complaints of left ankle pain, stiffness and altered gait. Dr. Copeland diagnosed Claimant with osteochondritis dissecans lesion of the left talus. Dr. Copeland recommended conservative treatment with possible surgical intervention if the ankle did not improve. Claimant returned to Dr. Copeland on February 28, 2006 and noted that her ankle was improving, although Claimant had not done much with her ankle from a physical standpoint. Dr. Copeland recommended Claimant continue with the conservative treatment and consider a possible arthrotomy for debridement and/or drilling of an osteochondritis dissecans lesion if the conservative treatment was not successful.

4. Claimant returned to Dr. Stagg on March 7, 2006 with continued complaints of pain. Claimant reported to Dr. Stagg that she did not want surgical intervention if possible. Dr. Stagg noted that Claimant would be referred to an ankle specialist outside the Grand Junction area, as there was not an ankle specialist in Grand Junction. Claimant was evaluated by Dr. Desai on March 20, 2006 as a referral from Dr. Stagg.

Dr. Desai diagnosed Claimant with contracture of the tendon of the left ankle, plantar fascial fibromatosis and juvenile osteochondrosis of the left foot. Dr. Desai noted that an MRI of the left foot confirmed the existence of the osteochondral lesion of the left ankle and recommended microfracture surgery. Claimant underwent microfracture surgery of the left ankle on April 12, 2006 under the auspices of Dr. Desai.

5. Post-surgery, Claimant continued to follow up with Dr. Stagg. Dr. Stagg continued Claimant with work restrictions and recommended a course of physical therapy. Dr. Stagg eventually placed Claimant at maximum medical improvement ("MMI") on July 18, 2006 with a 4% lower extremity impairment rating. Respondents filed a Final Admission of Liability ("FAL") based upon the impairment rating from Dr. Stagg, and Claimant filed an application for a Division-sponsored Independent Medical Examination ("DIME") on September 25, 2006. On the application for DIME, Claimant listed the specific body parts to be evaluated as the "left ankle". Nonetheless, in August 2006, Dr. Stagg noted that Claimant complained of knee pain from an altered gait and opined that the knee complaints were related to her industrial injury. Dr. Stagg recommended that Claimant continue with her therapy and exercise program and follow up after both had been completed.

6. Claimant eventually underwent a DIME with Dr. Kelley on October 30, 2006. Dr. Kelley, in his November 8, 2006 report noted that the Claimant complained of left ankle pain and limitation of motion and left knee pain. Claimant reported to Dr. Kelley that her ankle injury left her with an altered gait, and she started to develop left knee pain that persisted despite the surgical treatment and improvements in her ankle symptomology. Dr. Kelley noted that Claimant had followed up with Dr. Stagg after she was placed at MMI and Dr. Stagg noted Claimant's knee complaints in his August 17, 2006 report. Dr. Kelley opined that Claimant was at MMI for her ankle, but not at MMI for her left knee. Dr. Kelley recommended an orthopedic evaluation to discern if additional treatment for the left knee was appropriate.

7. Following Claimant's evaluation with Dr. Kelley, Claimant returned to Dr. Stagg on December 15, 2006. Dr. Stagg noted Claimant had persistent knee pain and an MRI had been obtained. Dr. Stagg noted that Claimant's knee pain appeared to be the result of tracking problem and noted that the MRI revealed a large posterior ganglion cyst. Dr. Stagg referred the Claimant to Dr. Hackett at the Stedman Hawkins clinic at Claimant's request. Dr. Hackett diagnosed Claimant as having patellofemoral chondromalacia and recommended conservative treatment including a home exercise program. Claimant returned to Dr. Hackett's office on July 19, 2007 with continued complaints of pain with walking or after sitting for long periods of time. Dr. Hackett's assistant provided a diagnosis of left knee quadriceps tendonitis and improving patellofemoral syndrome and recommended continued physical therapy. Claimant was to follow up with Dr. Hackett in four (4) weeks to check on her progress.

8. Claimant returned to Dr. Stagg on December 6, 2007 for follow up examination. Claimant also provided Sr. Stagg with a typed letter at the December 6, 2007 examination recommending various referrals and a change from Dr. Stagg as her treat-

ing physician. Dr. Stagg noted that he had not seen Claimant for quite some time, and that Claimant was requesting to be returned to Dr. Kelley, the DIME physician, and a change from her care with Dr. Stagg. Claimant also requested a repeat MRI of the ankle and knee. Dr Stagg noted that he referred the Claimant to the insurance carrier to address the change of physician request, and referred the Claimant to Dr. Kelley to address the MRI request.

9. Claimant returned to Dr. Kelley on May 9, 2008 for her follow up DIME. Dr. Kelley noted that Claimant had obtained an MRI of her knee and had an orthopedic evaluation, with a diagnosis of patellofemoral syndrome with mild abnormalities in her patellofemoral tracking. Claimant reported to Dr. Kelley that while she could not perform step classes because of her left ankle and knee, she believed her ankle range of motion had improved since her initial DIME appointment. Claimant reported she was reasonably pleased with her current status and asked whether orthotics would be beneficial for her condition. Dr. Kelley noted that Claimant's mild left knee patellofemoral tracking abnormalities were due to her gait disturbance from the ankle injury, but noted that the cyst on the knee MRI was unrelated to the workers' compensation injury. Dr. Kelley noted that Claimant was at MMI with an 18% lower extremity impairment rating. Dr. Kelley further opined that no follow up was expected to be necessary, and specifically determined that orthotics were not recommended for Claimant.

10. Respondents filed a final admission of liability based upon the follow DIME report from Dr. Kelley and Claimant filed a timely Objection to the Final Admission of Liability. Claimant sought an Independent Medical Evaluation ("IME") with Dr. Ellen Price on November 18, 2008. Dr. Price opined that Claimant was at MMI, but would need some further treatment to maintain MMI, including referral to an orthotist and gait evaluation along with possible periodic corticosteroid injections of Synvisc injections. Dr. Price provided Claimant with a PPD rating of 17% of the lower extremity. Dr. Price reiterated her opinions regarding maintenance care in response to an inquiry from Claimant's attorney on March 6, 2009.

11. In response to an inquiry from Claimant's attorney, Dr. Desai opined on April 2, 2009 that Claimant would need post MMI medical care including evaluation of the ankle, possible MRI, an ankle injection and possible ankle debridement.

12. Claimant testified at hearing that she would like to have her care transferred from Dr. Stagg to Dr. Price. Claimant testified that she repeatedly complained of pain in her knee to Dr. Stagg and other treating physicians, but was not able to obtain treatment for her knee until after the DIME with Dr. Kelley. Claimant testified that she does not trust that Dr. Stagg will properly treat her injuries. The ALJ notes that the medical records from Dr. Desai, and Dr. Copeland do not reveal any complaints of knee pain from Claimant. The first medical records documenting knee pain involve Dr. Stagg's follow up examination in August, 2006, prior to Claimant's initial DIME with Dr. Kelley. The ALJ also notes that Claimant's application for DIME dated September 25, 2006, and filled out by Claimant, only indicates the left ankle as the body part to be examined. Claimant also admitted on cross examination that in January 2006 when she

asked for an MRI of the ankle, Dr. Stagg complied with this request. Following the MRI, Dr. Stagg referred the Claimant for a CT scan, in conjunction with the recommendations of the radiologist. Dr. Stagg likewise referred Claimant to Dr. Copeland who was not a part of Dr. Stagg's office for evaluation. Dr. Stagg also referred the Claimant for a second opinion with Dr. Desai upon Claimant's request. After Claimant underwent the DIME with Dr. Kelley, Dr. Stagg timely referred the Claimant for an MRI of the left knee, as recommended by Dr. Kelley's DIME report. Lastly, when Claimant requested a referral to the Stedman Hawkins Clinic for her orthopedic evaluation, Dr. Stagg complied with her request and referred Claimant to Dr. Hackett.

13. The ALJ credits the medical records from Drs. Stagg, Kelley, Copeland and Desai with regard to Claimant's receipt of medical care and notes that Claimant has received appropriate medical care through Dr. Stagg. The ALJ credits the DIME report of Dr. Kelley insofar as it indicates that orthotics are not appropriate for Claimant. The ALJ credits the report of Dr. Desai insofar as it opines that follow up care in the form of evaluation of the ankle would be appropriate for Claimant.

CONCLUSIONS OF LAW

1. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of her physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, *supra*, thus authorizes the ALJ to enter an order for future maintenance treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

2. As found, Claimant has proven by a preponderance of the evidence that she is entitled to ongoing maintenance treatment to prevent further deterioration of her physical condition. Claimant's request for follow up care in the form of repeat examinations with her treating physician, and possibly other treatment recommendations made by the treating physician, is found to be reasonable and necessary to prevent further deterioration of her physical condition. Claimant's request for orthotics is found to be outside the scope of the treatment recommendations and is not necessary to prevent further deterioration of Claimant's physical condition.

3. Upon proper showing to the division, the employee may procure its permission at any time to have a physician of the employee's selection attend said employee. Section 8-43-404(5)(a)(VI), *supra.* Claimant may procure a change of physician where she has reasonably developed a mistrust of the treating physician. *See Carson v. Wal-Mart,* W.C. No. 3-964-07 (ICAO April 12, 1993). The ALJ may consider whether the employee and physician were unable to communicate such that the physician's treatment failed to prove effective in relieving the employee from the effects of her

injury. *See Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (ICAO November 1995). But, where an employee has been receiving adequate medical treatment, courts are reluctant to allow a change in physician. *See Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (ICAO December 5, 1995) (ICAO affirmed ALJ's refusal to order a change of physician when the ALJ found claimant receiving proper medical care); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (ICAO August 23, 1995) (ICAO affirmed ALJ's refusal to order a change of physician where physician could provide additional reasonable and necessary medical care claimant might require); and *Guynn v. Penkhus Motor Co.*, W.C. No. 3-851-012 (ICAO June 6, 1989) (ICAO affirmed ALJ's denial of change of physician where ALJ found claimant failed to prove inadequate treatment provided by claimant's authorized treating physician).

4. In deciding whether to grant a change in physician, the ALJ should consider the need to insure that the claimant is provided with reasonable and necessary medical treatment as required by § 8-42-101(1), *supra*, while also protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be held liable. *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (ICAO 11/27/07); s*ee Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999). Moreover, the ALJ is not required to approve a change in physician because of a claimant's personal reasons, including mere dissatisfaction. *See Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

5. As found, Claimant has failed to prove by a preponderance of the evidence that she is entitled to a change of physician from Dr. Stagg to Dr. Price. Claimant's request for a change of physician is, therefore, denied and dismissed.

ORDER

It is therefore ordered that:

1. Respondents shall pay for maintenance medical treatment provided by Claimant's authorized treating physician that is necessary to maintain the Claimant at MMI and is designed to prevent further deterioration of her medical condition.

2. Claimant's request for a change of physician from Dr. Stagg to Dr. Price is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED: May 26, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-736-360 & WC 4-688-993

ISSUES

1. Is the Claimant's May 26, 2006 full contest workers' compensation claim barred by the statute of limitations?
2. Was the Claimant in the course and scope of his employment at the time of the May 26, 2006 workers' compensation claim?
3. Did the Claimant sustain a compensable right knee injury at the time of his July 17, 2006 workers' compensation claim?
4. Did the Claimant sustain a 22% scheduled impairment of his left lower extremity as a result of the July 17, 2006 workers' compensation claim?

FINDINGS OF FACT

1. Claimant was injured on May 26, 2006 when heavy equipment being operated by a co-employee of the Respondent-Employer struck the Claimant's stationary pick-up truck while Claimant was standing in the rear.

2. Claimant reported the injury to the Respondent-Employer. Respondent-Employer immediately sent the Claimant to their workers' compensation physician for treatment. The Respondent-Employer filed a First Report of Injury with the Division of Workers' Compensation.

3. On June 26, 2006 the Respondent-Insurer filed a Notice of Contest, denying liability on the basis that the injury was not in the course and scope of Claimant's employment. The Respondent-Employer informed Claimant that he would be covered under the Respondent-Employer's general liability. Claimant detrimentally relied upon this assertion. Claimant has established good cause for failing to file a claim with the division within two years. Claimant's filing within three years, for good cause has been established. The Respondent-Employer and the Respondent-Insurer were aware of all of the facts at all times from the date of injury. Respondents did not suffer any prejudice thereby, and the claim is not barred by the statute of limitations.

4. The ALJ finds Claimant to be more credible than contrary testimonial evidence.

5. Claimant's work-related injuries of May 26, 2006 are compensable under the Workers' Compensation Act of Colorado.

6. On July 17, 2006 Claimant suffered an admitted work-related injury when he fell while leaving work. Claimant was using a handrail while walking down stairs and when he approached the ground floor his left leg slipped on loose gravel causing him to fall directly onto his left knee.

7. Claimant was treated for this injury and ultimately placed at maximum medical improvement on October 22, 2008. The DIME physician specifically found Claimant's right knee condition to be related to the work injury.

8. Claimant is entitled to *Grover*-type medical benefits for his right knee.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201.The parties stipulated to an average weekly wage of $455.00 under each of the claims herein.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. In order to recover benefits the claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment. Section 8-41-301(1)(b) & (c), C.R.S.*; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of " element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

4. Generally, injuries sustained while an employee is going to or coming from work do not arise out of and in the course of the employment. *Sturgeon Electric v. Industrial*

Claim Appeals Office, 129 P.3d 1057 (Colo. App. 2005). However, in *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999), the Supreme Court of Colorado adopted a "fact-specific analysis" to be used in determining whether a traveling employee's injury warrants the application of an exception to the going to and coming from rule. The *Madden* court endorsed the consideration of variables including, but not limited to: "(1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer's premises, (3) whether travel was contemplated by the employment contract, and (4), whether the obligations and conditions of employment created a 'zone of special danger' out of which the injury arose." *Id*. at 864.

5. The claimant alleges that the injuries he sustained in the accident on May 26, 2006, arose out of and in the course of his employment. The claimant contends that because he had begun his work day by picking up money at the bank and because the employer allowed him to use the landfill to dump personal refuse, his presence at the landfill at the pertinent time was contemplated by his employment contract. The ALJ agrees with the claimant's arguments and concludes the accident on May 26, 2006, arose out of and in the course of the claimant's employment.

6. Section 8-43-103(2), C.R.S. provides that the right to workers' compensation is barred unless a formal written claim is filed with the Division within 2 years of the injury. This statute of limitations begins to run when the claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury," *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). This two-year statute of limitation can be extended to three years upon a showing of reasonable excuse. *See e.g. In re Procopio*, W.C. No. 4-465-076 (ICAO, 6/10/2005).

7. The ALJ concludes that the Claimant established good cause for his failure to file within two years based upon misrepresentations from the Respondent-Employer as found above. The Claimant's claim is not barred.

8. The ALJ concludes that Claimant's right knee condition was proximately caused by his admitted left knee injury of July 26, 2006.

9. The parties stipulated that the authorized treating medical facility is CCOM.

10. Claimant suffered an injury on May 26, 2006 arising out of and in the course of his employment as a cashier with the Respondent–Employer.

11. Claimant's impairment rating provided by Dr. Healy is not apportionable to Claimant's injury of May 26, 2006 under claim WC 4-688-993. Claimant is entitled to 22% permanent impairment to his lower extremity in relation to the claim under WC 4-736-360.

ORDER

It is therefore ordered that:

1. Respondent-Insurer shall pay Claimant's reasonable, necessary and related medical expenses incurred to date for injuries sustained on May 26, 2006.
2. Respondent-Insurer shall pay impairment benefits in accordance with Dr. Healy's 22% lower extremity assessment in the DIME.
3. Respondent-Insurer shall pay for *Grover*-type medical benefits related to Claimant's right knee.
4. Respondents shall pay statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.
5. All matters not determined herein are reserved for future determination.

Date: May 19, 2009

/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-731-219

ISSUES

The issues for determination are:

A. Offset for third-party settlement;
B. Liability for the medical services rendered to Claimant by Performance Back and Champion Health Associates; and
C. Medical benefits after maximum medical improvement (MMI).

FINDINGS OF FACT

1. Claimant had a work-related automobile accident on August 4, 2005. Claimant did not file a Workers' Claim for Compensation until August 7, 2007. Employer did not file a First Report of Injury until August 28, 2007. Respondent denied the claim on September 4, 2007. Claimant filed an Application for Hearing.
2. While the Workers' Compensation hearing was pending, Claimant settled her third party claim for $34,000.00. She did not notify the Division of Workers Compensation or Insurer of this settlement.
3. A hearing was held on April 9, 2008. In an order mailed to the parties on May 23, 2008, the ALJ determined the claim was compensable and not barred by the statute of limitations.
4. A Division independent medical examiner determined that Claimant had sustained an impairment of 16% of the whole person. Insurer filed a Final Admission of Liability on November 4, 2008. Insurer admitted for an impairment of 16% of the whole person. Insurer took credit for the entire third-party settlement and denied liability for any medical or disability benefits.

5. Performance Back, Inc., and Champion Health Associates, LLC, provided treatment to Claimant for the injuries she sustained in the compensable claim. The treatment was provided in September and October 2005.

6. On August 30, 2008, more than two years after the work-related injury, Claimant's attorney sent a summary of medical expenses to Insurer. Claimant submitted bills at the Workers' Compensation hearing on compensability on April 9, 2008. On September 29, 2008, more than 120 days after the claim was found compensable, Claimant sent to Insurer liens from Performance Back and Champion Health Associates. On October 2, 2008, Claimant sent a billing ledger to Insurer. None of the documents from Performance Back and Champion Health Associates were submitted on the "required forms", contained proper billing codes or had supporting medical documentation attached.

7. Dr. Timothy Hall placed Claimant at maximum medical improvement on January 23, 2007. He stated that Claimant was involved in splinting with Dr. Redfern and will require periodic adjustments. Dr. Struck examined Claimant on October 13, 2008. Dr. Struck recommended that Claimant undergo quarterly bite orthotic adjustment by Dr. Redfern.

CONCLUSIONS OF LAW

A. Offset for third party settlement:

In 2003, the Colorado General Assembly revamped the Workers' Compensation Subrogation Statutes under Section 8-41-203, C.R.S. As part of the revision, the legislature enacted a series of provisions requiring parties to give notice. Both the insurance company and the injured worker are required to notify each other under certain circumstances such as offering to settle a third-party claim, filing a complaint against a third-party, or settling a third-party claim.

Section 8-41-203(4)(a)(i) states:

> "If the employee. . . makes a demand upon or a request of a person or entity not in the same employ as the employee to seek recovery for damages arising from action of such other person or entity, the employee or dependent shall also give written notice, within ten days, to the Division of Workers' Compensation and to all parties who may be responsible for paying benefits to the employee. . ."

Claimant was required to notify Insurer of its intent to settle the third-party claim. Prior to entering into the settlement, Claimant had filed a Workers' Claim for Compensation, and an Application for Hearing. Claimant was alleging that the accident was covered under the Workers' Compensation Act. She knew that Insurer "may be responsible for paying benefits."

The use of the term "shall" connotes a mandatory requirement. Claimant "made a demand or request" upon the third-party. Claimant eventually settled her case with the third-party for $34,000.00. Therefore, under Section 8-41-203(4)(a)(i), C.R.S., Claimant was required within ten days of making or receiving the $34,000.00 offer of

settlement to give written notice to the Division of Workers' Compensation and to Insurer.

Claimant failed to give written notice to the Division of Workers' Compensation and to Insurer of her demand or offer to settle her third-party case. Section 8-41-203(4)(d)(i), C.R.S., states: "If the employee or dependents fail to provide the written notice required pursuant to subsection (i) of paragraph (a) of this subsection (4); the party responsible for paying Workers' Compensation benefits shall be entitled to reimbursement from *all monies collected* from the third-party for all economic damages and for all physical impairment and disfigurement damages without any credit for reasonable attorneys' fees…"

Claimant failed to give written notice to the Division of Workers' Compensation and Insurer as required. Insurer is entitled to credit for "all monies collected" - the entire $34,000.00 third-party settlement without reduction for attorneys' fees or costs.

B: Liability for the medical services rendered by Performance Back and Champion Health Associates:

Insurer is liable for the medical care Claimant receives from authorized providers that is reasonably needed to cure and relieve Claimant from the effects of the compensable injury. Section 8-42-101(1), C.R.S. Insurer is not liable for medical bills submitted more than 120 days after the date of service. Rule 16-11, WCRP, is entitled "Payment of Medical Benefits." Subsection (1) states, "Providers shall submit their bills for services rendered within one hundred twenty (120) days of the date of service. Bills first received later than 120 days may be denied unless extenuating circumstances exist." Further, Rule16-7, WCRP, requires that all medical bills be submitted using "required forms." These bills must contain proper billing codes (Rule 16-7(C), WCRP) and supporting medical records must be attached (Rule16-7(E), WCRP).

On August 30, 2008, more than two years after the work-related injury, Claimant's attorney sent a summary of medical expenses to Insurer. Claimant submitted bills at the Workers' Compensation hearing on compensability on April 9, 2008. On September 29, 2008, after the claim was found compensable, Claimant sent to Insurer, liens from Performance Back and Champion Health Associates. On October 2, 2008, Claimant sent a billing ledger to Insurer. None of the documents from Performance Back and Champion Health Associates were submitted on the "required forms", contained proper billing codes, nor was "supporting medical documentation" attached. Insurer is not liable for the charges of Performance Back and Champion Health Associates.

C. Medical benefits after MMI:

Insurer continues to be liable for medical benefits after MMI if the claimant shows substantial evidence that future medical treatment is or will be reasonably necessary to relieve the claimant from the effects of the injury or to prevent deterioration of the claimant's condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Claimant has made that showing. Insurer is liable for the costs of such care by authorized pro-

viders in amounts not to exceed the Division of Workers' Compensation fee schedule. Section 8-42-101(3), C.R.S. Insurer may offset this liability against the third-party settlement if any amounts of that settlement have not already been offset against the compensation and benefits due.

ORDER

It is therefore ordered that:

1. Insurer may credit $34,000.00 against the medical costs and disability payable on this claim.
2. Insurer is not liable for the charges of Performance Back and Champion Health Associates.
3. Insurer is liable for medical benefits after MMI that are reasonably needed to cure and relieve Claimant from the effects of the compensable injury.
4. All matters not determined herein are reserved for future determination.

DATED: *May 19, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-731-219

ISSUES

The issues for determination are:

A. Offset for third-party settlement;
B. Liability for the medical services rendered to Claimant by Performance Back and Champion Health Associates; and
C. Medical benefits after maximum medical improvement (MMI).

FINDINGS OF FACT

1. Claimant had a work-related automobile accident on August 4, 2005. Claimant did not file a Workers' Claim for Compensation until August 7, 2007. Employer did not file a First Report of Injury until August 28, 2007. Respondent denied the claim on September 4, 2007. Claimant filed an Application for Hearing.

2. While the Workers' Compensation hearing was pending, Claimant settled her third party claim for $34,000.00. She did not notify the Division of Workers Compensation or Insurer of this settlement.

3. A hearing was held on April 9, 2008. In an order mailed to the parties on May 23, 2008, the ALJ determined the claim was compensable and not barred by the statute of limitations.

4. A Division independent medical examiner determined that Claimant had sustained an impairment of 16% of the whole person. Insurer filed a Final Admission of Liability on November 4, 2008. Insurer admitted for an impairment of 16% of the whole person. Insurer took credit for the entire third-party settlement and denied liability for any medical or disability benefits.

5. Performance Back, Inc., and Champion Health Associates, LLC, provided treatment to Claimant for the injuries she sustained in the compensable claim. The treatment was provided in September and October 2005.

6. On August 30, 2008, more than two years after the work-related injury, Claimant's attorney sent a summary of medical expenses to Insurer. Claimant submitted bills at the Workers' Compensation hearing on compensability on April 9, 2008. On September 29, 2008, more than 120 days after the claim was found compensable, Claimant sent to Insurer liens from Performance Back and Champion Health Associates. On October 2, 2008, Claimant sent a billing ledger to Insurer. None of the documents from Performance Back and Champion Health Associates were submitted on the "required forms", contained proper billing codes or had supporting medical documentation attached.

7. Dr. Timothy Hall placed Claimant at maximum medical improvement on January 23, 2007. He stated that Claimant was involved in splinting with Dr. Redfern and will require periodic adjustments. Dr. Struck examined Claimant on October 13, 2008. Dr. Struck recommended that Claimant undergo quarterly bite orthotic adjustment by Dr. Redfern.

CONCLUSIONS OF LAW

A. Offset for third party settlement:

In 2003, the Colorado General Assembly revamped the Workers' Compensation Subrogation Statutes under Section 8-41-203, C.R.S. As part of the revision, the legislature enacted a series of provisions requiring parties to give notice. Both the insurance company and the injured worker are required to notify each other under certain circumstances such as offering to settle a third-party claim, filing a complaint against a third-party, or settling a third-party claim.

Section 8-41-203(4)(a)(i) states:

> "If the employee. . . makes a demand upon or a request of a person or entity not in the same employ as the employee to seek recovery for damages arising from action of such other person or entity, the employee or

> dependent shall also give written notice, within ten days, to the Division of Workers' Compensation and to all parties who may be responsible for paying benefits to the employee. . ."

Claimant was required to notify Insurer of its intent to settle the third-party claim. Prior to entering into the settlement, Claimant had filed a Workers' Claim for Compensation, and an Application for Hearing. Claimant was alleging that the accident was covered under the Workers' Compensation Act. She knew that Insurer "may be responsible for paying benefits."

The use of the term "shall" connotes a mandatory requirement. Claimant "made a demand or request" upon the third-party. Claimant eventually settled her case with the third-party for $34,000.00. Therefore, under Section 8-41-203(4)(a)(i), C.R.S., Claimant was required within ten days of making or receiving the $34,000.00 offer of settlement to give written notice to the Division of Workers' Compensation and to Insurer.

Claimant failed to give written notice to the Division of Workers' Compensation and to Insurer of her demand or offer to settle her third-party case. Section 8-41-203(4)(d)(i), C.R.S., states: "If the employee or dependents fail to provide the written notice required pursuant to subsection (i) of paragraph (a) of this subsection (4); the party responsible for paying Workers' Compensation benefits shall be entitled to reimbursement from *all monies collected* from the third-party for all economic damages and for all physical impairment and disfigurement damages without any credit for reasonable attorneys' fees…"

Claimant failed to give written notice to the Division of Workers' Compensation and Insurer as required. Insurer is entitled to credit for "all monies collected" - the entire $34,000.00 third-party settlement without reduction for attorneys' fees or costs.

B: Liability for the medical services rendered by Performance Back and Champion Health Associates:

Insurer is liable for the medical care Claimant receives from authorized providers that is reasonably needed to cure and relieve Claimant from the effects of the compensable injury. Section 8-42-101(1), C.R.S. Insurer is not liable for medical bills submitted more than 120 days after the date of service. Rule 16-11, WCRP, is entitled "Payment of Medical Benefits." Subsection (1) states, "Providers shall submit their bills for services rendered within one hundred twenty (120) days of the date of service. Bills first received later than 120 days may be denied unless extenuating circumstances exist." Further, Rule16-7, WCRP, requires that all medical bills be submitted using "required forms." These bills must contain proper billing codes (Rule 16-7(C), WCRP) and supporting medical records must be attached (Rule16-7(E), WCRP).

On August 30, 2008, more than two years after the work-related injury, Claimant's attorney sent a summary of medical expenses to Insurer. Claimant submitted bills at the Workers' Compensation hearing on compensability on April 9, 2008. On September 29,

2008, after the claim was found compensable, Claimant sent to Insurer, liens from Performance Back and Champion Health Associates. On October 2, 2008, Claimant sent a billing ledger to Insurer. None of the documents from Performance Back and Champion Health Associates were submitted on the "required forms", contained proper billing codes, nor was "supporting medical documentation" attached. Insurer is not liable for the charges of Performance Back and Champion Health Associates.

C. Medical benefits after MMI:

Insurer continues to be liable for medical benefits after MMI if the claimant shows substantial evidence that future medical treatment is or will be reasonably necessary to relieve the claimant from the effects of the injury or to prevent deterioration of the claimant's condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Claimant has made that showing. Insurer is liable for the costs of such care by authorized providers in amounts not to exceed the Division of Workers' Compensation fee schedule. Section 8-42-101(3), C.R.S. Insurer may offset this liability against the third-party settlement if any amounts of that settlement have not already been offset against the compensation and benefits due.

ORDER

It is therefore ordered that:

1. Insurer may credit $34,000.00 against the medical costs and disability payable on this claim.

2. Insurer is not liable for the charges of Performance Back and Champion Health Associates.

3. Insurer is liable for medical benefits after MMI that are reasonably needed to cure and relieve Claimant from the effects of the compensable injury.

4. All matters not determined herein are reserved for future determination.

DATED: *May 19, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-736-360 & WC 4-688-993

ISSUES

Is the Claimant's May 26, 2006 full contest workers' compensation claim barred by the statute of limitations?

Was the Claimant in the course and scope of his employment at the time of the May 26, 2006 workers' compensation claim?

Did the Claimant sustain a compensable right knee injury at the time of his July 17, 2006 workers' compensation claim?

Did the Claimant sustain a 22% scheduled impairment of his left lower extremity as a result of the July 17, 2006 workers' compensation claim?

FINDINGS OF FACT

Claimant was injured on May 26, 2006 when heavy equipment being operated by a co-employee of the Respondent-Employer struck the Claimant's stationary pick-up truck while Claimant was standing in the rear.

Claimant reported the injury to the Respondent-Employer. Respondent-Employer immediately sent the Claimant to their workers' compensation physician for treatment. The Respondent-Employer filed a First Report of Injury with the Division of Workers' Compensation.

On June 26, 2006 the Respondent-Insurer filed a Notice of Contest, denying liability on the basis that the injury was not in the course and scope of Claimant's employment. The Respondent-Employer informed Claimant that he would be covered under the Respondent-Employer's general liability. Claimant detrimentally relied upon this assertion. Claimant has established good cause for failing to file a claim with the division within two years. Claimant's filing within three years, for good cause has been established. The Respondent-Employer and the Respondent-Insurer were aware of all of the facts at all times from the date of injury. Respondents did not suffer any prejudice thereby, and the claim is not barred by the statute of limitations.

The ALJ finds Claimant to be more credible than contrary testimonial evidence.

Claimant's work-related injuries of May 26, 2006 are compensable under the Workers' Compensation Act of Colorado.

On July 17, 2006 Claimant suffered an admitted work-related injury when he fell while leaving work. Claimant was using a handrail while walking down stairs and when he approached the ground floor his left leg slipped on loose gravel causing him to fall directly onto his left knee.

Claimant was treated for this injury and ultimately placed at maximum medical improvement on October 22, 2008. The DIME physician specifically found Claimant's right knee condition to be related to the work injury.

Claimant is entitled to *Grover*-type medical benefits for his right knee.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201.The parties stipulated to an average weekly wage of $455.00 under each of the claims herein.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

In order to recover benefits the claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment. Section 8-41-301(1)(b) & (c), C.R.S.*; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of " element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

Generally, injuries sustained while an employee is going to or coming from work do not arise out of and in the course of the employment. *Sturgeon Electric v. Industrial Claim Appeals Office,* 129 P.3d 1057 (Colo. App. 2005). However, in *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999), the Supreme Court of Colorado adopted a "fact-specific analysis" to be used in determining whether a traveling employee's injury warrants the application of an exception to the going to and coming from rule. The

Madden court endorsed the consideration of variables including, but not limited to: "(1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer's premises, (3) whether travel was contemplated by the employment contract, and (4), whether the obligations and conditions of employment created a 'zone of special danger' out of which the injury arose." *Id*. at 864.

The claimant alleges that the injuries he sustained in the accident on May 26, 2006, arose out of and in the course of his employment. The claimant contends that because he had begun his work day by picking up money at the bank and because the employer allowed him to use the landfill to dump personal refuse, his presence at the landfill at the pertinent time was contemplated by his employment contract. The ALJ agrees with the claimant's arguments and concludes the accident on May 26, 2006, arose out of and in the course of the claimant's employment.

Section 8-43-103(2), C.R.S. provides that the right to workers' compensation is barred unless a formal written claim is filed with the Division within 2 years of the injury. This statute of limitations begins to run when the claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury," *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). This two-year statute of limitation can be extended to three years upon a showing of reasonable excuse. *See e.g. In re Procopio*, W.C. No. 4-465-076 (ICAO, 6/10/2005).

The ALJ concludes that the Claimant established good cause for his failure to file within two years based upon misrepresentations from the Respondent-Employer as found above. The Claimant's claim is not barred.

The ALJ concludes that Claimant's right knee condition was proximately caused by his admitted left knee injury of July 26, 2006.

The parties stipulated that the authorized treating medical facility is CCOM.

Claimant suffered an injury on May 26, 2006 arising out of and in the course of his employment as a cashier with the Respondent–Employer.

Claimant's impairment rating provided by Dr. Healy is not apportionable to Claimant's injury of May 26, 2006 under claim WC 4-688-993. Claimant is entitled to 22% permanent impairment to his lower extremity in relation to the claim under WC 4-736-360.

ORDER

It is therefore ordered that:

Respondent-Insurer shall pay Claimant's reasonable, necessary and related medical expenses incurred to date for injuries sustained on May 26, 2006.

Respondent-Insurer shall pay impairment benefits in accordance with Dr. Healy's 22% lower extremity assessment in the DIME.

Respondent-Insurer shall pay for *Grover*-type medical benefits related to Claimant's right knee.

Respondents shall pay statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

All matters not determined herein are reserved for future determination.

Date: May 19, 2009
/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS
W. C. No. 4-738-502

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 12, 2009 in Denver, Colorado. The hearing was digitally recorded (reference: 5/12/09, Courtroom 1, beginning at 8:31 AM, and ending at 10:18 AM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel, to be submitted electronically. Respondents were given 3 working days after receipt of the proposed decision within which to filer electronic objections. The proposed decision was filed on May 18, 2009. On the same date, Respondents indicated they had no objections to the proposed decision. After a consideration of the proposed decision, the ALJ has modified it and, as modified, hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; and, medical benefits (authorization, and reasonably necessary).

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant was an electrician for the Employer for approximately 1 1/2 years prior to the incident that resulted in an injury to his low back.

2. On August 23, 2007, the Claimant drove a van provided by his Employer to a job site. According to the Claimant, the van was extremely uncomfortable due to the cage mounted directly behind the driver's seat.

3. When the Claimant arrived at the job site, he felt pain and stiffness in his low back.

4. The Claimant's pain did not subside, and on October 15, 2007 the Claimant reported the incident as a work-related injury to his Employer, David Lanning. Dale Vizzini, the Employer's Safety Manager, was then notified of the injury. Axiom, the Employer's workers' compensation medical administrator, was also notified of the injury. The Claimant knew, or reasonably should have known as of August 23, 2007 that he had sustained a work-related back injury.

5. Neither the Employer nor Axiom told the Claimant where to receive medical treatment for his work-related injuries. The Claimant sought treatment with his family physician, Kelly H. Lowther, M.D. Dr. Lowther referred the Claimant to a spine specialist, Hans Coester, M.D.

6. The Claimant underwent an MRI (magnetic resonance imaging) on September 27, 2007, and it revealed a right paracentral disc herniation at L5-S1.

7. Dr. Coester requested authorization from ESIS, the claims administrator for the insurer herein, to perform an L5-S1 discectomy. The requested authorization was denied.

8. On January 23, 2008, the Claimant underwent the L5-S1 discectomy performed by Dr. Coester.

9. Following the January 23, 2008 surgery, the Claimant received treatment from Gregory Reichhardt, M.D., on referral from Dr. Coester. Dr. Coester made the referral for post-surgical care. In his April 14, 2008 report, Dr. Reichhardt states "Mechanism of Injury: Driving a van on a rough road in an awkward position at work." Without objection, the ALJ took administrative notice that Dr. Reichhardt is Level II Accredited by the Division of Workers' Compensation. Dr. Reichhardt evaluated and treated the Claimant on several occasions, and he was more familiar with the Claimant's symptoms and injuries than Robert Messenbaugh, M.D., Respondents' Independent Medical Examiner (IME). The ALJ finds Dr. Reichhardt's opinion persuasive, credible and rendered to a reasonable degree of medical probability.

10. The Employer Dr. Messenbaug to perform a records review regarding the Claimant's injury. Dr. Messenbaug agreed that the surgical procedure recommended by Dr. Coester was indicated based upon Claimant's symptoms and MRI findings. Dr.

Messenbaugh, however, was of the opinion that Claimant's low back condition was not causally related to the work-related driving incident described by the Claimant. The ALJ finds that Dr. Messenbaugh's opinion on causality is not based on adequate study of the Claimant's medical case. Moreover, the ALJ finds Dr. Reichhardt's opinion in this regard more persuasive and credible.

11. Further, the ALJ finds the Claimant's testimony credible and consistent with the medical records and reports of his treating physicians.

12. The Claimant has established that it is more reasonably probable that the driving incident described in paragraphs 2 and 3 above, caused the disc herniation for which surgery was required. Therefore, the Claimant has proven, by a preponderance of the evidence that he sustained a compensable injury to his low back on August 23, 2007. Additionally, the Claimant has proven by preponderant evidence that neither his Employer nor Axiom, the Employer's medical administrator, made any specific medical referral once the Claimant reported the work-related nature of his back injury on October 15, 2007. Consequently, the Claimant made a first selection of his family physician, Dr. Lowther, who then referred him to Dr. Coester for surgery. Thereafter, Dr. Coester referred the Claimant to Dr. Reichhardt for post-surgical care. Consequently, the Claimant has proven by preponderant evidence that Dr. Coester and Dr. Reichhardt were within the authorized chain of referrals and within the natural progression of medical care.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, Dr. Messenbaugh's opinion is not based on adequate study of the Claimant's medical case, and Dr. Reichhardt's opinion on causality is more persuasive and credible than Dr. Messenbaugh's opinion in this

regard. Also, the Claimant's testimony is credible and consistent with the medical opinion of his treating physicians.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Claimant has sustained his burden with respect to compensability, authorization of medical care and surgery, and the causal relatedness of that medical care to the compensable low back injury of August 23, 2007.

c. As found, after reporting the work-related nature of his injury, the Claimant was never informed where to receive medical care and treatment for his August 23, 2007 injury. If the services of a physician are not offered when the employee notifies the employer of an occupational injury, the employee is permitted to select the treating physician. Section 8-43-404 (5)(a), C.R.S. (2008). If the employer does not select the physician, the employee's right to pick the treating doctor becomes vested. *Brickell v. Business Machines, Inc*., 817 P.2d 536 (Colo. App. 1990). Accordingly, the medical providers that treated the Claimant for the August 23, 2007 work-related injury are authorized.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant's August 23, 2007 injury is compensable.

B. Respondents shall pay the costs of medical treatment and surgery for the Claimant's low back injury, rendered after October 15, 2007 at the hands of Dr. Lowther, Dr. Coester and Dr. Reichhardt, subject to the Division of Workers' Compensation Medical Fee Schedule.

C. The pre- and post-surgical treatment provided to the Claimant was reasonably necessary and causally related to the compensable injury.

D. Any and all issues not determined herein are reserved for future decision.

DATED this _____ day of May 2009.

EDWIN L. FELTER, JR.

Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-739-406

ISSUE

The issue to be determined is whether Claimant suffers functional impairment off the schedule for purposes of being awarded permanent partial disability (PPD) benefits based on a conversion to a whole person impairment rating.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his right shoulder while picking up a sheet of plywood.

2. Claimant underwent arthroscopic surgery with acromioplasty and a mini-open rotator cuff repair on November 7, 2007 by David Beard, M.D.

3. Claimant was released at maximum medical improvement (MMI) on July 10, 2008 and assessed with a 4% upper extremity impairment rating by the authorized treating physician, Margaret Irish, D.O.

4. Dr. Milliken performed a Division independent medical examination (DIME) on December 8, 2008. Dr. Milliken agreed that Claimant was at MMI and assessed him with an 11% right upper extremity impairment rating which converts to a 7% whole person impairment rating.

5. Respondents admitted to the 11% extremity rating in the December 30, 2008 Final Admission of Liability. Claimant applied for hearing on the issue of converting the extremity rating to a whole person rating.

6. Stretching his arm above shoulder level and away from the body caused pain to Claimant's shoulder. Pain from Claimant's shoulder flows into his collarbone. Claimant experiences pain only in his right shoulder.

7. Claimant reported to his therapist in late February and early March 2008 that he was experiencing pain in the range of 0-1 out of a scale of 0-10 and that he tolerated lifting activities well.

8. Dr. Irish reported on February 19, 2008 that Claimant's pain was located in the right shoulder and that he considered it to be mild and intermittent.

9. On March 4, 2008, Claimant stated that his right shoulder was doing very well and felt that the pain was essentially resolved. Dr. Irish placed Claimant on regular duty after previously restricting him from reaching away from his body or working above shoulder height.

10. When released at MMI by Dr. Irish on July 10, 2008, Claimant described the pain in the right shoulder as an ache, which he considered to be minimal. He also stated that the onset of pain was rare. Dr. Irish found during her examination that Claimant had very good functional range of motion with no pain throughout the right shoulder.

11. At the DIME conducted by Dr. Milliken on December 8, 2008, Claimant complained of a pain level of 3 on a scale of 0-10 for anterior, lateral and posterior shoulder pain. Claimant was using one to two Vicodin pills per day to control his pain, mostly at night. Claimant described that his pain generally occurred when using his right arm extended away from his body and, less prominently, when he uses the arm in the overhead position. Dr. Milliken examined the neck and noted that the range of motion was painless.

12. The situs of Claimant's functional impairment is the shoulder and is not limited to the arm. Claimant has functional impairment proximal to the arm. Claimant's impairment is not limited to the schedule.

CONCLUSIONS OF LAW

When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. Section 8-42-107(1)(a), C.R.S. In this context, "injury" refers to the situs of the functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo.App. 1996). Whether a claimant suffered an impairment that can be fully compensated under the schedule of disabilities is a factual question for the ALJ. *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo.App. 1996).

Claimant testified as to pain in the shoulder area and into the collarbone when extending his arm away from his body. the medical records do document complaints of pain in the shoulder. Claimant's functional impairment is to his shoulder, not to his arm. Claimant's impairment is not limited to the "loss of an arm at the shoulder." Section 8-42-107(2)(a), C.R.S. Claimant has established by a preponderance of the evidence that his impairment is not limited to the schedule of disabilities at Section 8-42-107(2), C.R.S. Claimant's impairment must be calculated based on an impairment of seven percent of the whole person. Sections 8-42-107(8)(c) and (d), C.R.S.

The parties stipulated that the issue of medical benefits should remain open.

ORDER

It is therefore ordered that:

1. Insurer shall pay Clamant permanent partial disability benefits based on an impairment of seven percent of the whole person. Insurer may credit any previous payments of permanent disability benefits. Insurer shall pay Claimant interest at the rate of eight percent per annum on any benefits not paid when due.

2. The issue of medical benefits is reserved for future determination.

DATED: *May 27, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-739-639

ISSUE

The following issue was raised for consideration at hearing:

1. Petition to Reopen based on worsened condition;

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is a 48 year old male who worked for the Employer for 28 years. Claimant suffered an admitted work related injury on June 27, 2007. The mechanism of Claimant's injury involved a slip accident in which Claimant did not actually fall. Claimant's right leg slipped outward and he assumed a semi split posture. Thereafter, Claimant felt pain in his low back and right buttock. Claimant stopped working in December 2007 and has not returned since.

2. Claimant continued to work before seeking medical attention. Claimant worked full duty for two weeks before seeking medical attention with Dr. William Alexander, M.D. Dr. Alexander diagnosed a lumbar strain, recurrent with acute exacerbation from work activities and degenerative disk disease, not work related, but aggravated.

3. In August 2007, Claimant underwent a MRI, which demonstrated multi-level degenerative disc disease, degenerative joint disease and congenital stenosis resulting in variable degrees of central canal foraminal stenosis and nerve root impingement. An EMG study was negative for radiculopathy.

4. Claimant continued treatment with Dr. Alexander who prescribed physical therapy and medication. Dr. Alexander referred Claimant for a surgical evaluation with Dr. Brian Reiss on April 16, 2008. Dr. Reiss found that Claimant was not a good candidate for surgery because it would not reduce Claimant's pain or increase his function. Dr. Reiss agreed with Dr. Alexander that Claimant was approaching maximum medical improvement (MMI) and that he should continue a home exercise program.

5. On April 22, 2008, Claimant was placed at maximum medical improvement (MMI) with permanent work restrictions, which included a 45lb. occasional and 10lb. constant lift, carry, push and pull restriction. Claimant was further restricted to 10 hours per day of walking, standing, sitting and crawling. Claimant was released to return to modified duty.

6. On September 24, 2008, Claimant underwent a Division Independent Medical Evaluation with Dr. Albert Hattem, M.D. Dr. Hattem agreed that Claimant was at MMI and he assessed a 12% whole person impairment rating. The DIME physician recommended that Claimant repeat a MRI for comparison, that he receive a 6 month gym membership and undergo four to six session of counseling to assist him in adjusting to his functional status. Claimant also received six to twelve months of refills on ibuprofen.

7. On November 11, 2008, Claimant returned to Dr. Alexander reporting increased pain in the low back with radiation down the right leg to the foot. Dr. Alexander assessed a multi-factorial low back pain and SI joint dysfunction. Claimant declined the gym membership because he report that increased activity caused increased pain and he refused four to six session of counseling and referral to a psychiatrist because he did not believe it would help. Claimant was referred for a MRI consistent with the DIME physician's recommendation.

8. On November 18, 2008, Claimant returned to Dr. Alexander to discuss the MRI results. The MRI showed interval changes with a right disc that was impinging on the right L-3 nerve root. The doctor notted that this was a new finding compared to the last MRI. There was disc protrusion at L5-S1 level which was bilateral and had worsened with increased encroachment on the right side. Dr. Alexander referred Claimant to Dr. Floyd Ring for epidural steroid injections.

9. The steroid injections caused no improvement in Claimant's condition. A second surgical evaluation with Dr. Brian Reiss produced the same opinion that Claimant was not a surgical candidate.

10. Claimant testified at hearing that his condition had worsened since being placed at MMI on April 22, 2008. Claimant testified that in approximately June, 2008 his condition worsened. Claimant described decreased function and increased intensity of back pain during activities including sleeping, laying down, walking, yard work, sitting and driving. Claimant testified that he could not walk as far. Claimant indicated his condition had progressively worsened and was worse at the time of hearing than when he was placed at MMI. Claimant requested to undergo a core stabilization program.

11. Dr. Alexander testified credibly at hearing that Claimant remained at MMI since April 22, 2008. Dr. Alexander noted that Claimant had the same permanent restrictions as when placed at MMI. Dr. Alexander testified that the repeat MRI, second surgical consultation and injections by Dr. Ring represented maintenance medical benefits. Dr. Alexander noted that even though Claimant has not worked since December 2007, per Claimant's subjective complaints his condition has worsened. Dr. Alexander credibly testified that Claimant suffered from a multifactorial diagnosis regarding his low back. Dr. Alexander testified credibly that Claimant's condition was degenerative in nature and it was reasonable that over time, Claimant's back condition has become progressively deteriorate. Dr. Alexander credibly testified that Claimant's progressive degenerative condition was not related to Claimant's industrial accident. Dr. Alexander felt that Claimant's permanent restrictions as determined by the functional capacity evaluation was still appropriate. Dr. Alexander's testimony is found credible and persuasive.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the ALJ draws the following conclusion of law:

1. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leaves the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

2. A Workers' Compensation case is decided on its merits. Section 8-43-201, supra. The facts in a Workers' Compensation case must be interpreted neutrally, neither in favor or the rights of Claimant nor in favor of the rights of respondents. Section 8-43-201, supra. The judge's factual findings concern only the evidence and inferences that are found to be dispositive of the issues involved that; that the judge has not addressed every piece of evidence and every inference that might lead to conflicting conclusions and has rejected evidence and inferences contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v Industrial Claims Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interests. *See Prudential Insurance Co. v Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. At anytime within six (6) years after the date of injury, the Director or an ALJ may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition. Section 8-43-303(1), C.R.S. Claimant bears the burden of proof to establish the change of medical condition is causally related to the industrial injury. *Lymburn v. Symbios Logic*, 952 P.2d 831(Colo. 1987); *Savio House v. Dennis*, 665 P 2d. 141(Colo. App. 1983). The authority to reopen

a claim under C.R.S. 8-43-301(1), CRS 2008 is generally discretionary with the ALJ. *Lochhead v. Graebel Movers*, W.C. No. 4-624-521(19, 2008).

5. As found, Claimant credibly testified that his condition changed in June 2008 after being placed at MMI. The evidence established that both Dr. Hattem, the DIME physician, and Dr. Alexander, the authorized treating physician, felt that claimant remained at MMI. A claim may not be reopened where the claimant's condition worsened but the claimant remains at MMI. *Richards v. ICAO*, 996 P.2d 756(Colo. App. 2000). While reopening may be based on testimony of an injured worker without the necessity of medical evidence, in the present claim, Claimant's testimony was found to be less credible and persuasive than the medical records, the DIME opinion by Dr. Hattem, and the testimony of Dr. Alexander. *Palmer v. I.C.A.O.,* WC No. 3-942-052(May 21, 1991). Therefore, reopening is not supported by the evidence.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to establish by a preponderance of the evidence that his condition has worsened and changed since April 22, 2008. Claimant's request for reopening based upon change of condition is denied and dismissed.

All matters not determined herein are reserved for future determination.

DATED: May 18, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-740-818

ISSUES

The sole issue for determination was whether Claimant is permanently and totally disabled. The Claimant stipulated that should this claim of permanent total disability be established the offset to Social Security retirement benefits found at § 8-42-103 (1)(c)(II)(A), C.R.S., will apply, as applicable.

FINDINGS OF FACT

1. Claimant is a credible witness and her testimony is persuasive and consistent with the medical records in the case.

2. This is an admitted claim involving Claimant's bi-lateral shoulder injuries. The date of injury is August 15, 2007.

3. Claimant's date of birth is December 14, 1932. She was seventy-six years of age as of the date of hearing. Claimant has a tenth grade education having left high school in 1950. She does not have a GED. She credibly testified that she has no computer skills.

4. Claimant began working for Employer in 1984 and continued to work through October 2007, a period of approximately twenty-three years. Her job title was that of baked goods stock clerk.

5. Following her injury Claimant underwent an MRI of both her left and right shoulders. The MRI of her right shoulder demonstrated a large retracted full thickness tear of the suprsapinatus tendon, moderate to advanced atrophy of the supraspinatus muscle with mild fatty atrophy of the infraspinatus and deltoid muscle and narrowing of the supraspinatus osseos outlet. Exhibit F, BS 38 - 39.

6. The left shoulder MRI found that Claimant showed a large rim rent tear of the suprspinaus tendon with partial thickness surface tear of the infrspinatus tendon with intrasubstance delamination. This was accompanied by moderate narrowing of the coracoacromial outlet primarily due to a type III acromial morphology. Exhibit F, BS 36 - 37.

7. In September 2003, Claimant had suffered an earlier right shoulder injury that was treated by Dr. Zuehlsdorff. She was evaluated by orthopedic surgeon Dr. Failinger who opined that Claimant was not a surgical candidate for her right shoulder rotator cuff supraspinatus tear then, since this problem was not markedly affecting her life. Exhibit 6.

8. Following the MRI's Claimant underwent a course of conservative treatment at Arbor Occupational Medicine for the remainder of 2007 and into 2008.

9. On October 16, 2007, Dr. Alexander opined that Claimant had permanent restrictions in his hand written notes. Exhibit B, BS 22. In his typed notes he stated that Claimant "is restricted to no lifting, pushing or pulling with either arm and not to work overhead with either arm and not to reach away from the body with either arm." *Id*. (emphasis).

10. These 2007 permanent restrictions for Claimant's right shoulder are similar to those placed on her in 2003, when Dr. Zuehlsdorff gave Claimant permanent restrictions on her right shoulder as follows: "Five pounds lift, push, pull or carry and limit overhead and forward reaching." Exhibit H, p. 43.

11. On February 8, 2008, Claimant underwent a Functional Capacities Evaluation ("FCE") at the request of ATP Dr. Alexander.

12. During the FCE Claimant underwent testing for her grip strength. According to the testimony of Dr. Stirplin her grip strength was limited to approximately 4.33 pounds. Dr. Striplin Transcript ("STR") p. 32, lines 1 – 4. This is dramatically less than the gripping for females age seventy-five. Exhibit C, BS 28.

13. The FCE noted Claimant's reduced squatting capacity, and unsafe body mechanics. A notation was made that following a lift Claimant became dizzy and was required to sit and rest. *Id*., BS 13.

14. Further, the upper extremity postural tolerance test was attempted but discontinued after three job simulated tasks secondary to pain flaring, *Id*. 15. Following a 100 ft. carry the Claimant experienced a pain level of 9/10 in the right shoulder and 8/10 in the left shoulder. *Id*.

15. The FCE summary provided as follows:

[Claimant] is presently lifting in the Sedentary work classification as demonstrated by her occasional 12" to knuckle lift with 5 lbs., knuckle to shoulder lift with 5 lbs., shoulder to overhead lift with 1 lb., 100 ft. bilateral carry with pivot using 5 lbs., and 3o ft. hook lift and carry with 5lbs. using the right hand and left hand independently. Modifications to the floor to knuckle lift were required during testing secondary to body mechanic deficits and reduced squatting capacity due to right hip pain. The patient reported reduced bilateral upper extremity strength and bilateral glenohumeral joint pain during testing. During an upper extremity postural tolerance test, the patient demonstrated restrictions with repetitive forward, overhead, and low reaching to stimulate removing and replacing trays on a bakery rack with a 2 lb. tray utilized. She c/o bilateral glenohumeral joint pain while carrying a 2 lb tray 100 ft. repetitively. Testing was terminated by the evaluator prematurely secondary to subjective c/o bilateral glenohumeral joint pain (right-9/10, left-8/10). A cryotherapy treatment to each shoulder was provided for 15 minutes. *Id.*

16. There is no reference in the FCE of Claimant's demonstrated ability of Claimant to lift, push or carry fifteen pounds, as a matter of fact. *Id.* BS 14.

17. Although sitting and standing were not specifically tested, the FCE stated that:

There were no restrictions with forty-seven minutes of continuous sitting during the intake history, and with intermittent stationary standing during the three hours and thirty minutes during the FCE performed on February 7, 2008. Exhibit 4, BS 14.

18. Claimant was placed at Maximum Medical Improvement ("MMI") on February 19, 2008.

19. After being placed at MMI Claimant was given restrictions by ATP Dr. Alexander as follows:

The patient is placed on permanent restrictions of maximum lifting, carrying and pushing of fifteen pounds and maximum repetitive lifting of two pounds. She may occasionally lift up to five pounds, carry up to five pounds, push and pull up to five pounds and repetitively lift up to one pound. In addition, the patient should have a maximum lifting above the shoulder and two pounds occasionally above shoulder height. The patient basically qualifies for sedentary work capacity. Exhibit 2, p. 2.

20. Dr. Zierk, Respondent's vocational expert, defined the terms "sedentary work", "light work" and "occasionally" consistently with Social Security Rule ("SSR") 83 – 10. Dr. Zierk Transcript ("ZTR") p. 50, line 4 to p. 51, line 12. Exhibit 1. "Occasionally" is defined there as "occurring from very little to one-third of the time." *Id*. SSR 83 – 10, p. 4.

21. As testified by Dr. Striplin, Dr. Alexander's report does not explain how he determined that Claimant could lift fifteen pounds given that the FCE had shown Claimant's lifting capacity as no greater than five pounds, and that he had limited Claimant to occasionally lifting five pounds. STR, p. 38, lines 7 – 16. Dr. Striplin also could not explain how ATP Dr. Alexander's permanent restrictions had changed from October 16, 2007, although Claimant's bilateral shoulder range of motion had decreased. STR p. 37 lines 8 - 20. Finally, Dr. Striplin could not explain how Claimant's right shoulder restrictions were greater than those given by Dr. Zuehlsdorff in 2003 and which Dr. Alexander had previously adopted. Id. p. 38, lines 7 – 16.

22. Claimant was terminated by Employer in February 2008, when Employer informed Claimant that it could not accommodate her restrictions.

23. Claimant credibly testified, and it is found, that as a result of her bilateral shoulder pain she experiences significant functional limitations. She can no longer mow her lawn or rake leaves; and her household activities are limited. Hearing Transcript ("HT") p. 12, line 18, to p. 13, line 2.

24. Claimant must have help in all phases of grocery shopping. Specifically, groceries must be loaded for her at both the store and into her house. She cannot lift a gallon of milk, which weighs less than ten pounds. She has discomfort driving because her hands hurt and because her shoulders and upper extremities are painful while driving. *Id.*, p. 13, line 21 to p. 14, lines 23. She has limited grip strength and is unable to open a soda bottle or a bottle of Nyquil.

25. Claimant credibly testified, and it is found, that as a result of intractable pain levels she does not leave the house one to two days a week. She cannot tell when her pain will reach those levels. *Id*., p. 12, line 8 to p. 13, line 4. When the pain does reach those levels she is incapable of dealing with outside activities.

26. John Macurak was retained by Claimant to render an opinion concerning Claimant's employability. He concluded that Claimant suffers upper extremity pain which affects her ability to use her upper extremity, can only drive short distances, and

displays an occasional level of standing and walking tolerance of up to forty seven minutes.

27. Mr. Macurak also evaluated the current labor market in the Denver metropolitan area considering Claimant's education, physical limitations and work experience to determine the availability of work in this market. He concluded that with Claimant's physical limitations she would not be able to engage in even "sedentary" employment opportunity in the Denver metro job market. Based on his research it was Macurak's opinion that Claimant was unemployable as a result of her August 15, 2007, injury and unable to earn any wages as a result of that injury. Exhibit 7, p. 40. This opinion is credible and persuasive.

28. Dr. Zierk, Respondent's vocational expert, disagreed. In his report Dr. Zierk listed numerous job contacts. Dr. Zierk asserted that Claimant could perform the job of a part-time cashier.

29. All of the jobs Dr. Zierk listed at BS 68 – 99 had a preference for high school graduates, or at least individuals with a GED. *Id*. Exhibit I, BS 68- 69; HT p. 56, lines 12 - 16. This preference alone is likely to exclude Claimant as a work candidate.

30. Dr. Zierk opined that Claimant was employable despite the economy. He agreed that the vast majorities of the jobs that he identified required lifting beyond the lifting restrictions given by ATP Dr. Alexander.

31. Dr. Zierk assumed that Claimant could perform a sedentary to light job with lifting restrictions in the area of approximately fifteen pounds. ZTR p. 34, line 18 to p. 35, line 16. Without commenting on frequency, Dr. Zierk relied on the fact that he believed Claimant would be able to lift up to fifteen pounds (ZTR, p. 35 line 9), while acknowledging that the FCE failed to demonstrate a lifting capacity of greater than five pounds. *Id*. p. 47, line 24 to p. 49, line 22. Dr. Alexander agreed that Claimant could only **"**occasionally**"** lift up to five pounds, carry up to five pounds and pull up to five pounds, and repetitively lift up to one pound." Exhibit 2, p. 2.

32. Dr. Zierk admitted in his deposition that he did not tell potential employers that Claimant would be limited to repetitively lifting up to one pound and would have a maximum lifting above the shoulder of two pounds. ZTR, p. 51, line 24 to p. 52, line 10.

33. Although there is some conflict, Dr. Alexander's restrictions, and the FCE, demonstrate that Claimant's restrictions are in a less than sedentary (10 lbs). Her restrictions are appropriately at the five-pound level, except above the shoulder when lifting is limited to two pounds and with repetitive work limited to one pound lifting.

34. It is clear that Dr. Alexander incorporated the FCE into his final restrictions by limiting Claimant to only "occasional" lifting and carrying to five pounds. He apparently permitted some lifting of fifteen pounds because he perceived Claimant was capable of performing this based on what was allegedly done in "physical therapy". Exhibit L. How frequently lifting at the level could safely be performed by Claimant is not de-

tailed by Dr. Alexander, although he limited lifting to five pounds "occasionally", i.e. "very little to one third of the times." SSR 83 – 10, p.4.

35. There were no physical therapy records introduced by either party showing that Claimant had a demonstrated ability to lift fifteen pounds. Additionally, there were no records to explain the basis of why the five pound lifting restriction given by Dr. Zuehlsdorff following Claimant's 2003 right shoulder injury were lifted to exceed five pounds.

36. Dr. Zierk agreed that Claimant had informed him that she was cautious with lifting activities and is concerned about aggravating her bilateral extremity symptoms with any type of moderate, awkward or repetitive sustained lifting; and that "[s]he estimated her safe maximum lifting tolerance at approximately five pounds on a non-repetitive basis". Exhibit I, BS 51.

37. Claimant's perceived restrictions credibly demonstrate her residual functional capacity as a matter of fact and are consistent with the FCE.

38. Claimant also informed Dr. Zierk that right or left shoulder activity induced pain at 6 on a 10 level of intensity *Id.*; and that bilateral upper extremity pain from activity contributes to a "progressive sense of tiredness." *Id*.

39. The opinion of John Macurak that Claimant is incapable of earning any wages is found credible and persuasive. The opinion of Dr. Zierk is rejected as not convincing.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado" ("ACT") is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

4. Permanent total disability occurs when a Claimant is unable to earn any wages in the same or other employment. Section 8-40-101(16.5)(a), C.R.S; *Frederick v. Boise-Cascade Colorado*, W.C. # 4-705-392 (ICAO 3/2/09).

5. Claimant is required to prove permanent total disability by a preponderance of evidence. See *Younger v. City and County of Denver,* 810 P.2d 647 (Colo. 1991).

6. In determining whether the Claimant is capable of earning wages this Court may consider a myriad of human factors. See *Christie v. Coors Transportation Co.,* 933 P.2d 1330 (Colo. 1997). These factors include the Claimant's physical condition, mental ability, age, employment history, education, and the "availability of work" Claimant can perform. *Weld County School District RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998). They also include non-industrial medical conditions which impair the Claimant's ability to earn wages, since they are part of human factors. The only limitation in considering these factors is that the effects of the industrial injury must be a causative factor to the permanent total disability. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

7. Section 8-40-201(16.5)(a), C.R.S., defines permanent total disability as a Claimant's inability "to earn any wages in the same or other employment." The overall objective of this standard is to determine whether, in view of all of factors, employment is "reasonably available to the claimant under his or her particular circumstances." *Weld County School District RE-12 v. Bymer,* 955 P.2d at 558 (Colo. 1998).

8. There is a dispute concerning Claimant's residual functional capacity which this Court resolves in favor of Claimant. The FCE Claimant underwent on February 8, 2008, shows Claimant's ability to lift effectively limited to five pounds, repetitive lifting of one pound and shoulder to overhead lifting of two pounds. Although Dr. Alexander opined that Claimant may be able to lift up to "fifteen pounds" he does not opine at what frequency this can be performed. However, since Dr. Alexander limits Claimant to only "occasionally" lifting five pounds, it is clear that he relied on the Claimant's FCE, as well as the five pound right shoulder restrictions given to Claimant in 2003 by Dr. Zuehlsdorff. Further, Dr. Striplin acknowledged that Claimant's overall bilateral shoulder functioning has continued to deteriorate following her 2007 injury. Additionally, Claimant credibly testified that approximately 1 - 2 days per week her physical condition is such that she cannot leave her house. This would result in her missing work at the rate of between 52 and 104 days per year.

9. This seventy six year old Claimant, who has evidenced a good work ethic in the past, is incapable of earning any wages given her physical condition, mental ability, work history, education, age and the availability of work. Claimant has proven by a preponderance of the evidence that she is permanently and totally disabled.

ORDER

It is therefore ordered that:

1. Claimant is permanently and totally disabled under the statutory definition found at § 8-40-101 (16.5), C.R.S.

2. Claimant shall be paid PTD benefits at the rate of $233.80 per week subject to a Social Security retirement benefits offset permitted by § 8-42-103 (1)(c)(II)(A), C.R.S.

3. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

DATED: May 14, 2009

Barbara S. Henk
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-743-263

ISSUES

Whether the opinion of the DIME physician on the issue of MMI has been overcome by clear and convincing evidence.

Whether the Claimant should be granted a change of physicians to Dr. Jeffrey Kleiner, M.D.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. Claimant sustained an admitted injury on November 23, 2007 while employed by Employer in the men's clothing department. On the date of injury, Claimant was lifting clothes off the floor and suffered an onset of left-sided back pain.

2. Claimant was referred by Employer to Concentra Medical Center for treatment where on November 26, 2007 she was examined by Dr. Felix Meza, M.D. Dr. Meza performed a physical examination that he noted was limited secondary to Claimant's reported pain and discomfort. Dr. Meza diagnosed low back pain, prescribed medications and referred Claimant for physical therapy.

3. Dr. Meza saw Claimant in follow-up on December 12, 2007 and he noted that Claimant had been referred to Dr. Fall. Dr. Meza's treatment plan was to await further recommendations from Dr. Fall.

4. Claimant was initially evaluated by Dr. Allison Fall, M.D. on December 4, 2007 at the request of Dr. Meza. Dr. Fall is a specialist in physical medicine and rehabilitation. Dr. Fall took a history from Claimant regarding the injury and also noted that Claimant gave a history of frequent back pain prior to the injury. Dr. Fall's assessment was "Complaints of low back and left leg pain with subjective complaints greater than objective findings and out of proportion to the mechanism of injury." Dr. Fall ordered additional diagnostic tests and reviewed the MRI that had already been done.

5. Claimant was examined by Dr. Fall on January 7, 2008. Dr. Fall stated that she did not have an explanation for Claimant's severe complaints although significant degenerative changes and spondylolisthesis were noted. Dr. Fall recommended referral to a spine specialist to address causality and treatment recommendations.

6. On referral from Dr. Fall, Claimant was evaluated by Dr. Brian Reiss, M.D. on January 16, 2008. Dr. Reiss' impression was mechanical low back pain. Dr. Reiss recommended some pool therapy and facet joint injections. Dr. Reiss did not feel Claimant had a surgical problem unless she did extremely poor over the next few months.

7. Dr. Meza saw Claimant for follow-up on February 6, 2008 and noted minimal improvement from previous visits. Claimant reported not improvement with physical therapy to Dr. Meza. Dr. Meza stated that Claimant was most likely a candidate for chronic pain management and transferred her care to Dr. Darrel Quick for pain management.

8. Dr. Fall saw Claimant for follow-up on February 25, 2008. At this visit, Dr. Fall offered Claimant a pain psychology evaluation.

9. Dr. Quick evaluated Claimant on March 19, 2008 at the request of Dr. Meza. Dr. Quick noted a lot of grimacing and nonphysiologic behavior on examination. Dr. Quick's diagnosis was: " Overexertional injury event 11/23/07 resulting in low back pain with subjective greater than objective findings." Dr. Quick further noted that Claimant had failed to respond to conservative treatment and had not been found to be a surgical candidate. Dr. Quick's treatment plan included counseling and education about the likely chronic nature of Claimant's low back pain.

10. Dr. Fall evaluated Claimant on March 31, 2008 and placed her at MMI with 5% whole person impairment. Dr. Fall stated in her report that treatment had been reasonable and she had no further treatment recommendations. Based upon her testimony at hearing, it is found that Dr. Fall placed Claimant at MMI because she felt there had been an extensive workup with diagnostic testing, therapy, evaluation by a spine surgeon and that there was nothing further to do medically to improve Claimant's condition.

11. Dr. Quick evaluated Claimant on April 16, 2008. Dr. Quick noted that Claimant again demonstrated an antalgic gait, significant grimacing and non-physiologic

pain behavior. Dr. Quick had reviewed Dr. Fall's March 31, 2008 report and agreed with Dr. Fall that Claimant had attained MMI on March 31, 2008.

12. Respondents filed a Final Admission of Liability April 29, 2008 placing Claimant at MMI and admitting for 5% whole person impairment based upon the report of Dr. Fall dated March 31, 2008.

13. Dr. Douglas Scott, M. D., a specialist in occupational medicine, performed a DIME of Claimant on December 19, 2008 and issued a report of that same date. Dr. Scott reviewed the MRI scans and felt they were significant for disc herniations at L2-3 and L4-5. Dr. Scott stated his opinion that Claimant had features on examination and by MRI scan suggesting possible discopathy that had not been fully evaluated or treated. Dr. Scott found Claimant not to be at MMI and recommended EMG/nerve conduction study and possible selective nerve root injections.

14. Claimant returned to Dr. Fall on January 27, 2009 for the electro-diagnostic studies as recommended by Dr. Scott. These electro-diagnostic studies were normal without evidence of peripheral neuropathy, radiculopathy or other abnormality. Dr. Fall stated the electro-diagnostic studies reveal no evidence of radiculopathy. In Dr. Fall's opinion Claimant was appropriately placed at MMI and remained at MMI.

15. Dr. Scott testified by deposition taken on March 2, 2009. Upon questioning by Respondents' counsel, Dr. Scott stated that if he had had the EMG nerve conduction results done by Dr. Fall he would likely have found Claimant at MMI and now would agree with Dr. Fall that Claimant reached MMI on March 31, 2008.

16. At deposition upon questioning by Claimant's counsel, Dr. Scott agreed that it would be helpful to have a psychological evaluation to determine if there were other factors that might be interfering with Claimant's full recovery and the maintenance of her pain complaints. Dr. Scott's ultimate opinion was that a psychological evaluation was needed to determine if any pre-existing psychological condition had been aggravated or exacerbated by the work injury or was affecting Claimant's presentation on examination and that such an evaluation was necessary before proceeding with making a final determination of MMI. The ALJ finds that Dr. Scott's ultimate opinion is that the Claimant is not at MMI.

17. Dr. Reiss evaluated Claimant for a second time on October 14, 2008. Dr. Reiss suggested some psychological or psychiatric evaluation may prove useful to help Claimant deal with the situation and calm down the extraneous factors of non-physiologic findings on examination.

18. In reviewing Dr. Scott' opinion on the need for psychological evaluation as expressed in his testimony, Dr. Fall testified that she did not feel a mental status or psychological examination was necessary prior to MMI because Claimant had not made any complaints of depression or other psychological symptoms during the course of treatment. Dr. Fall agreed that as of July 28, 2008 when she re-evaluated Claimant, Claimant continued to present with non-organic and non-physiologic findings on exami-

nation. In a report of March 24, 2009, Dr. Fall stated that during her treatment of Claimant she did not find an indication for a psychological evaluation. This opinion conflicts with Dr. Fall's report of February 25, 2008 at which time she offered Claimant a pain psychology evaluation.

19. In her testimony at hearing, Dr. Fall agreed that Claimant fits the description for 'delayed recovery' as found in the Medical Treatment Guidelines for Low Back Pain, W.C.R.P. 17, and that the Treatment Guides recommend that the physician should strongly consider a psychological evaluation under this circumstance.

20. The ALJ finds that the ultimate opinion of the DIME physician, Dr. Scott, is that the Claimant continues not to be at MMI. The ALJ further finds that Respondents bore the burden of overcoming this opinion by clear and convincing evidence and that Respondents failed to sustained the required burden of proof to overcome the DIME physician's ultimate opinion on the determination of MMI.

21. Claimant was evaluated by Dr. Jeffrey Kleiner, M.D. on March 11, 2009. Dr. Kleiner felt Claimant presented with a left sided sacroiliac dysfunction and recommended an injection into the sacroiliac joint.

22. Claimant wants to have further treatment by Dr. Kleiner. Claimant does not want to return to Dr. Fall because she feels Dr. Fall does not 'trust' her or believe she has pain. The ALJ finds that Claimant has not established a sufficient reason for a change of physician from the ATP's, Dr. Fall, Dr. Quick, Dr. Reiss or Dr. Meza to Dr. Kleiner.

CONCLUSIONS OF LAW

23. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers compensation claim shall be decided on its merits. Section 8-43-201 (2008) C.R.S.

24. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

25. The DIME physicians' opinion consists not only of his written report but also any subsequent opinion given including the physicians' testimony at hearing. *Andrade v. Indus. Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005); *Lambert & Sons, Inc. v. Indus. Claim Appeals Office,* 984 P.2d 656 (Colo. App. 1998). Where a DIME physician offers ambiguous or conflicting opinions concerning MMI the ALJ is to resolve the ambiguity and determine the DIME physicians' true opinion as a matter of fact. *Magnetic Engineering Inc., supra.* In so doing, the ALJ is to consider all of the DIME physicians' written and oral testimony. *Dazzio v. Rice & Rice, Inc.,* W.C. No. 4-660-140 (June 30, 2008). Once the ALJ determines the DIME physician's opinion, the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence. *Dazzio v. Rice & Rice, Inc.,* supra; *Clark v. Hudick Excavating, Inc.,* W. C. No. 4-524-162 (November 5, 2004). The burden of proof may shift in a situation where the deposition testimony of the DIME physician is considered as part of the DIME physician's overall "finding". *Stephens v. North & Air Package Express Services,* W. C. No. 4-492-570 (February 16, 2005).

26. Dr. Scott's deposition testimony is properly considered as part of his overall finding regarding the issue of MMI and the testimony of Dr. Scott at deposition was admitted into evidence at hearing. In his written report, Dr. Scott opined that Claimant was not at MMI. Respondents then sought to overcome that opinion. At deposition, after review of the EMG nerve conduction test results, Dr. Scott agreed Claimant was at MMI as determined by Dr. Fall. The burden then shifted to Claimant to overcome that opinion. Upon further questioning by Claimant's counsel, Dr. Scott revisited his MMI opinion and stated that a psychological evaluation was necessary prior to making a final determination on MMI. As found, Dr. Scott's true opinion is that Claimant is not at MMI. Therefore, the burden shifted back to Respondents to overcome that opinion by clear and convincing evidence.

27. Sections 8-42-107(8)(b)(III) and (c), C.R.S. provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, *supra*. A mere difference of opinion between physicians fails to constitute error. *See, Gonzales v. Browning Ferris Indus. of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

28. As found, Respondents have failed to overcome the DIME finding of Dr. Scott that Claimant is not at MMI. Respondents rely primarily upon the testimony of Dr. Fall. Dr. Fall's testimony fails to establish that Dr. Scott is in error in his opinion that Claimant should have a psychological evaluation prior to determination of MMI. Dr. Fall herself offered Claimant a pain psychology evaluation at one point in her treatment of Claimant. Thus, Dr. Fall's later statement in response to Dr. Scott's opinion at deposi-

tion that she saw no reason during the course of her treatment for a psychological evaluation is not persuasive because Dr. Fall has contradicted her own opinions. Dr. Fall also admitted that Claimant is appropriately considered a 'delayed recovery' under the Division's Medical Treatment Guidelines that strongly suggest a psychological evaluation in such instances. Taken as a whole, Dr. Fall's opinions fail to establish that Dr. Scott was in error in finding that Claimant is not at MMI. In addition, the opinion of Dr. Reiss found in the October 14, 2008 report supports the finding of Dr. Scott that a psychological evaluation should be done prior to making a final determination of MMI.

29. Pursuant to C.R.S. § 8-43-404(5)(a) permits the employer or insurer to select the treating physician in the first instance. Once the respondents exercised their right to select the treating physician, the claimant may not change physicians without permission from the insurer or "upon the proper showing to the division." *Gianetto Oil Co. v. Industrial Claim Appeals Office,* 996 P.2d 570 (Colo. App. 1996). The ALJ possesses broad discretionary authority to grant a change of physician depending on the particular circumstances of the claim. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Szocinski v. Powderhorn Coal Co.,* W.C. No. 3-109-400 (December 14, 1998); and *Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (November 16, 1995). The ALJ is not required to approve a change in physician because of a claimant's personal reason, including mere dissatisfaction. *Greager v. Industrial Comm. Of the State,* 701 P.2d 168 (Colo. App. 1985). The ALJ's decision to grant a change of physician should consider the need to insure that the Claimant was provided with reasonable and necessary medical treatment as required by C.R.S. § 8-42-101(1), while protecting Respondent's interest in being apprised of medical treatment for which it will be held liable. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999).

30. As found, Claimant has not proven a sufficient basis for a change of physician to Dr. Kleiner. While Claimant is dissatisfied with Dr. Fall that does not exclude that Claimant could receive further treatment from Dr. Quick who suggested treatment for chronic pain management, or Dr. Reiss who suggested a similar treatment of psychological evaluation in line with the finding of the DIME physician, Dr. Scott. Claimant did not establish a sufficient basis for why she would specifically want treatment from Dr. Kleiner, other than her expressed dissatisfaction with Dr. Fall. The ALJ finds and concludes that Claimant has not made a proper showing for a change of physician to Dr. Kleiner.

ORDER

It is therefore ordered that:

1. Respondents have failed to overcome the opinion of the DIME physician that Claimant is not at MMI. Claimant has not reached MMI. In this regard, no specific request for benefits, such at temporary total or partial benefits, was requested and none are ordered.

2. Claimant's request for a change of physicians to Dr. Jeffrey Kleiner, M. D. is denied.

All matters not determined herein are reserved for future determination.

DATED: May 27, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-744-278

ISSUES

The following issues were raised for consideration at hearing:

1. Petition to Reopen based on fraud or mistake; and
2. Whether Respondents overcame the opinion of the Division Independent Medical Examiner (DIME) by clear and convincing evidence.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. This case pertains to Respondents' Petition to Reopen based on based on fraud or mistake and whether Respondents overcame the opinion of the Division independent medical examiner by clear and convincing evidence.

2. Prior to the injury which is the subject of this Petition to Reopen, Claimant suffered a work related injury February 3, 2000 when she was placed at maximum medical improvement (MMI) and received an impairment rating of 7% whole person for her lumbar spine (In 2000, Claimant received an overall rating of 9% whole person for the lumbar spine combined with a 2% whole person impairment for a left knee injury.)

3. Respondents Petitioned to Reopen the claim for a May 4, 2007 work injury to the lumbar spine arguing that Claimant was overpaid permanent partial disability benefits (PPD) for the lumbar spine injury of May 4, 2007. Respondents contend that it fraudulently or mistakenly awarded Claimant PPD based on a 7% whole impairment rating given for the May 4, 2007 work injury. Respondents assert that Claimant mislead her

providers with regard to the 2000 work injury for which she also received a 7% whole person impairment rating for the lumbar spine injury.

4. Claimant sustained a compensable injury to her lumbar spine on May 4, 2007. Claimant was moving what she believed to be empty boxes. After moving several empty boxes, Claimant lifted a box, which was not empty. Claimant reported that as a result of attempting to lift the box that was not empty, Claimant injured her low back

5. The medical records from the first visit made to Respondents' authorized treating physician, Dr. Robert Watson, M.D., reported on May 11, 2007 under the heading of "PAST MEDICAL HISTORY" that Claimant had a "Remote back injury." In the same report, under the heading of "PRIOR WORK RELATED INJURIES", the report reflects that Claimant has a "knee contusion remotely."

6. On June 27, 2007, Claimant underwent a MRI at Dr. Watson's request. In the section of the MRI report designated as the radiologist's "OPINION", the report reflects "Prior Examination is available for comparison from May 2000." The radiologist continues in the "OPINION" section of the June 27, 2007 report stating that there is a mild disk protrusion, no central canal or foraminal stenosis, and no compression of the neural elements.

7. On July 16, 2007, Claimant appeared for evaluation and treatment by Dr. Keith Graves, D.C. The doctor prepared a report dated July 16, 2007 in which he reports, [T]he patient has had a lumbar spinal MRI, which revealed normal degenerative changes throughout her lumbar spine that coincides with a woman of her age. This MRI was done in comparison with a previous lumbar spinal MRI in May 2000." In this report, Dr. Graves further states in the section of the report devoted to "Past Medical History", as follows: "The patient states that she had a previous lumbar spinal MRI for an insidious onset of lumbar spinal pain. The patient denies having any trauma associated with her previous lumbar spinal pain. The patient states that rest, physical therapy, and prescriptive medications helped control her symptomatology and her lumbar spinal complaints have been relatively stable since that time."

8. Claimant was referred to Dr. Gretchen Brunworth, M.D. by Dr. Watson for evaluation of back and leg problems on September 27, 2007. In Dr. Brunsworth's report in the section designated as, "HISTORY OF PRESENT ILLNESS", the doctor wrote that Claimant had been referred for a MRI in 2007. The doctor states, "The radiologist compared the MRI to an MRI she had in 2000 and did not feel that there were any significant changes. In the section of Dr. Brunworth's report designated a "PAST MEDICAL HISTORY", she wrote, "Past medical history is significant for a low back injury years ago. She is not exactly sure why she had the MRI in 2000 but reports that she does not remember having major problems with the back. She was pain-free regarding the back in May 2007, just prior to her injury. In the "ASSESSMENT" section of Dr. Brunworth's report, she states, "Ms. Krauth is a 60-year old woman who is seen today for evaluation of back and leg complaints. She apparently had an episode of back pain years ago and had an MRI, which was essentially unchanged from her current MRI."

9. Claimant was placed at maximum medical improvement on April 3, 2008. She underwent a Division independent medical evaluation (DIME) on August 30, 2008 with Dr. Annu Ramaswamy for the 2007 work injury. Claimant delivered to the doctor a June 26, 2007 MRI at the August 30, 2008 DIME. In the DIME report, Dr. Ramaswamy indicates in "PAST MEDICAL HISTORY" that Claimant reported that she had a history of low back pain. She reported to the doctor that she did not remember the circumstances but she remembered undergoing testing for low back pain discomfort in 2000.

10. In the August 2008 DIME report, under "RECORD REVIEW", Dr. Ramaswamy reports that Claimant states that she has not injured her low back in the last ten years before the 2007 work injury. Furthermore, Dr. Ramaswamy reports that the 2007 MRI shows facet degeneration and a small disc protrusion at T11 and T12. He notes that the 2007 MRI also shows evidence of disc degeneration, but no evidence of disc herniation. Bilateral osteophytes at L5-S1 and bilateral facet hypertrophy at L4-L5 were also noted in the 2007 MRI. Following the doctor's description of the 2007 MRI, he notes that, "Apparently a previous MRI had been performed in May of 2000, and there were no significant changes noted in comparison with that study."

11. Dr. Ramaswamy was not provided with the 2000 MRI. However, the 2000 work injury occurred while this Employer employed Claimant. Payment of the PPD was mad by this Employer.

12. On February 3, 2000, Claimant had the prior work-related low back injury. A Final Admission was filed in that claim on March 12, 2001. PPD based on a 9% whole person impairment rating was paid to Claimant. As previously stated, 7% of the 2000 impairment rating was based on injury to Claimant's lumbar spine. Claimant received $310.14 per week for 74 weeks until she received a total of $22,950.80 for PPD benefits.

13. Claimant testified she recalled previously injuring her low back at work but did not recall receiving a permanent impairment rating or PPD benefits. She did recall receiving some money following the 2000 work injury but did not recall receiving PPD benefits of $310.14 per week for 74 weeks totaling $22,950.80. She does not deny that she received these benefits.

14. Claimant testified credibly at hearing that she recalled receiving approximately $300.00 per week for a period of time for the work injury of 2000. She testified that she was not clear that the payment was part of a PPD award.

15. In 2000, the impairment rating report prepared by Dr. Annyce Mayer, M.D. provided the following narrative with regard to Claimant's lumbar spine rating:

> 3R, straight leg raise on the right maximum 55 degrees, straight leg raise on the left maximum 56 degrees. The sum of her sacral flexion and extension 28 degrees and 10 degrees was 38 degrees. The difference be-

tween that and her tightest maximum straight leg raise was 17 degrees greater than the 10 degrees maximum in the AMA guides therefore her lumbar flexion measurements are considered invalid. Lumbar extension maximum 19 degrees. This gives her a 2% impairment rating of the whole person, right lateral flexion was normal at 24 degrees, left lateral flexion maximum 17 degrees giving her a 1% impairment. Therefore for range of motion she has a total of 3% impairment of the whole person. This combines with the specific disorders Table 53 2B for a total of 7% whole person impairment due to her back

16. In 2007, Dr. Annu Ramaswamy, MD said the following in regard to rating Claimant's lumbar spine injury.

> At this point I believe that [Claimant's] permanency stems from her lower back strain. She has persistent low back pain and meets the criteria for permanency per Table 53. I also believe that she is deserving of permanency in terms of her low back condition, given that she has limited herself quite a bit in terms of her normal activities due to her pain level. Although she has evidence of a right lateral femoral cutaneous neuropathy, I do not believe that this is disabling or that it is significantly interfering with her overall function. It is more her lower back that is leading to her limitations at this time. There was no evidence of hip pathology or any other pathology that would correlate with permanency at this time.
>
> Per Table 53 at page 80 of the *AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised),* the patient's condition fits best under II-B secondary to her lumbar strain, and therefore she receives a 5% whole person impairment rating based on diagnosis.
>
> Per Table 60 on page 98 of the *Guides*, 64 degrees of true lumbar flexion with 48 degrees of sacral flexion correlates with a 0 degrees (sic) whole person rating. Per the same table, 20 degrees of lumbar extension correlates with a 2% whole person rating.
>
> Per Table 61 on page 98 of the Guides, 23 degrees of right lateral flexion correlates with a 0% whole person rating. Per the same table 24 degrees of left lateral flexion correlates with a 0% whole person rating.
>
> Summing up the ratings based on range-of-motion loss in the lumbar spine leads to a 2% whole person rating.
>
> The final rating, therefore, is the combination of the 5% rating per Table 53 and the 2% rating based on the range-of-motion loss in the lumbar spine, and this leads to a 7% whole person rating.

17. In Figure 83 of the 2000 and 2007 rating report in which lumbar range of motion was measured, the measurements were not drastically different. Dr. Ramaswamy was not provided the 2000 MRI or the 2000 impairment rating report.

18. In 2007, after paying the admitted PPD benefits, Respondents discovered that Claimant had a prior workers' compensation injury in February 2000 for which she received PPD benefits based upon a 7% whole person impairment rating for her lumbar spine. On December 5, 2008, Respondents filed a Petition to Reopen seeking to reopen on the basis of mistake or fraud.

19. Claimant contends that Respondents failed to sustain their burden of proof to establish that the Petition to Reopen based on fraud should be granted. The ALJ agrees. The ALJ finds that there was insufficient evidence from which to conclude that Claimant acted fraudulently. The evidence established that Claimant mentioned her 2000 work injury a number of times during the course of her treatment for the 2007 injury. The evidence established that a number of her treaters were aware of the existence of a 2000 MRI of the lumbar spine which was available for comparison and which treaters had compared. Finally, the evidence established that the 2000 and 2007 work injuries occurred while this Employer employed Claimant and that information concerning the 2000 work injury would have been available to the Respondents.

20. It is found based on the evidence presented at hearing that the award of PPD by Respondents without the DIME's consideration of the 2000 lumbar spine impairment rating was a mistake and therefore the Petition to Reopen is granted based on mistake. *Gregorich v. Industrial Commission*, 117 Colo.423, 118 P.2d 886 (1948). The failure to consider the 2000 impairment rating of the lumbar spine was clearly mistaken. The Act provides in Section 8-42-104(5)(a), C.R.S. that a prior medical impairment rating for the same body part shall be deducted from a subsequent injury to the same body part. The evidence established that the DIME was not provided and did not consider the 2000 rating report or the 2000 MRI.

21. The evidence also established that the DIME report was most probably incorrect since the DIME did not consider the 2000 medical impairment rating for the lumbar spine. Claimant, through counsel, argues that the lumbar spine contains numerous parts and that it is not possible to determine from the reports what parts of the lumbar spine are rated in the 2000 and 2007 reports. Claimant offers no evidentiary support for this argument. To the contrary, both the 2000 and 2007 MRI and medical impairment ratings considered the lumbar spine and utilized Table 53 in doing so.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S., *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to Employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

3. Under Section 8-43-303, C.R.S., a claim may be reopened on the basis of mistake or fraud. A party seeking to reopen a claim bears the burden of proof as to any issue sought to be reopened. Section 8-43-303(4).

4. In this case, it is concluded that Respondents failed to establish that the claim in this matter can be reopen on the basis of fraud. There is a lack of credible and persuasive evidence to establish that Claimant fraudulently kept information away from the Respondents about the 2000 injury. The evidence established that authorized treating physicians were made aware of the 2000 industrial injury and the 2000 MRI of the lumbar spine. Further, the evidence established that the injuries in 2000 and 2007 occurred while this Respondents employed Claimant.

5. The evidence established that Respondents Petition to Reopen on the basis of mistake should be granted. Clearly, payment of PPD for a 7% whole person lumbar spine impairment rating in 2000 and 2007 was error. Under section 8-42-104(5)(a), C.R.S., Respondents are entitled to deduct a previous medical impairment rating for the same body part from a current medical impairment rating. In light of this provision, it was a mistake for Respondents to file a Final Admission of Liability on December 10, 2008 on the basis of the August 30, 2008 medical impairment rating contained in the DIME report of Dr. Ramaswamy.

6. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the finding of a DIME physician with regard to the impairment rating and MMI determination (rating/IME) shall only be overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME (rating/MMI) must produce evidence showing it highly probable the DIME (rating/

MMI) is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by "clear and convincing evidence" if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro, supa.*

7. In this case, the 2000 MRI and impairment rating report and the 2007 MRI and impairment rating report are very much alike. On the basis of this evidence it was established that Claimant was provided the same impairment rating for the same body part, the lumbar spine. Dr. Ramaswamy's report did not consider the fact the Claimant had the prior lumbar spine medical impairment rating for a prior industrial injury and it is highly probable that the rating given in 2007 is incorrect.

8. The 2000 medical impairment rating of 7% should have been deducted from the 2007 medical rating for a 0% impairment. Respondents are entitled to be repaid for the 7% whole person medical impairment rating provided by Dr. Ramaswamy for payments totaling $20,152.72.

ORDER

It is therefore ordered that:

1. Respondents' Petition to Reopen based on mistake is granted.
2. Respondents' Petition to Reopen based on fraud is denied.
3. Respondents established by clear and convincing evidence that the 2008 DIME medical impairment rating is most probably incorrect. The correct medical impairment rating was 0% in light of the 2000 7% whole person medical impairment rating assessed for Claimant's lumbar spine.
4. Claimant shall repay Respondents for overpaid PPD benefits totaling $20,152.72.

All matters not determined herein are reserved for future determination.

DATED: May 14, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-745-040

ISSUES

The issues for determination are medical benefits after maximum medical improvement (MMI) and permanent partial disability benefits.

FINDINGS OF FACT

1. Claimant was injured on September 26, 2006. Claimant was placed at MMI on June 25, 2008.

2. Caroline Gellrick, M.D., the Division independent medical examiner (DIME), examined Claimant on October 21, 2008. Under current symptoms, she noted that Claimant gets headaches that come and go. Dr. Gellrick stated that Claimant had an impairment to his cervical spine and an occipital contusion with residual cephalalgia (headache) on a daily basis. She rated Claimant with an impairment of 13% for the impairment to the cervical spine and 5% for ongoing neurologic problem of persistent cephalalgia on a daily basis. The combined impairment was 17%.

3. Respondents do not challenge the 13% rating for the cervical spine. Respondents do challenge the additional 5% for headaches.

4. Dr. Gellrick based her 5% rating for headaches on the Revised Third Edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment", Table 1, page 109. Under “Episodic neurological disorders”, “Slight interference with daily livings may be assigned a rating of 5 to 15 percent of the whole person.

5. The Division of Workers’ Compensation *Impairment Rating Tips (updated November 2008)* provides that “Headaches which qualify for a separate work-related impairment rating should be rated using the Episodic Neurological Disorders section in Table 1 (Chapter 4, p. 109).” The *Rating Tips* warn that “if the headache rating is to be combined with another body part, the rater must be very careful not to rate the activities of daily living deficits in both impairment areas.“

6. Dr. John T. Sacha, an authorized treating physician, rated Claimant’s impairment on June 25, 2008. He stated that, “the only area appropriate for impairment is the cervical spine.” Dr. Sacha did not provide a rating for Episodic Neurological Disorders.

7. At her deposition, Dr. Gellrick stated that Claimant struck his head in the compensable accident and that can produce headaches. She testified that Claimant was experiencing headaches on a daily basis when she saw him. She stated that she did note that Dr. Sacha hadn’t rated Claimant for headaches, and that he had not made an issue of ongoing headaches. Dr. Gellrick acknowledged that the records do not show that Claimant had headaches on a daily basis and that for the ten months there was no record of a headache. She stated that Claimant’s treating physicians were focused on the neck and that one can tend not to pay attention to other symptoms. Dr. Gellrick testified that her impairment rating for the cephalalgia was appropriate in this case and was consistent with the Level II accreditation course materials and the AMA Guides. She state that the DOWC seminars reference that persistent cephalalgia can be considered

under episodic neurologic disorders. Dr. Gellrick based her rating on the mechanism of injury and Claimant's statement that he suffered headaches daily. She stated that Claimant had a closed head injury.

8. There are three references in Claimant's medical records to headaches. All of the references are before December 2007.

9. Dr. Christian Updike did a chart review on November 20, 2008. He stated that he disagreed with the impairment rating for cephalalgia for three reasons: 1) A diagnosis of significant cephalalgia is not supported by the medical documentation or Claimant's minimal pain medication use; 2) pain itself is rarely given an impairment by the protocol guidelines; and 3) chronic headaches for one year after a mild to moderate headache injury is very unusual. At hearing, Dr. Updike further explained that the rating for the neurologic disorder should only be used if Claimant had functional impairment from his headaches, which he did not.

10. Dr. Sacha stated in his December 22, 2008, report that Claimant's headaches are from his cervical spine that has already been rated and that there is no separate pathology to justify a separate impairment rating.

11. Claimant testified that he gets headaches every day since the accident, and that the headaches impair his functioning. Claimant testified that he has pain in both shoulders daily. When he gets pain in his shoulder, he gets pain in his head also (T-10:15). Neck pain starts first, then the pain goes into his head (T-10:17). Pain starts in his shoulder, then neck, then head. Sometimes the pain is just head. (T-10:20). Claimant's testimony is conflicting. It is found that Claimant's headaches are associated with an increase in his shoulder and neck pain, and do not occur independently of his shoulder and neck pain.

12. The testimony of Dr. Sacha and Dr. Updike is credible and persuasive. It is highly probable that the rating of Dr. Gellrick for cephalalgia is incorrect.

13. Claimant has sustained a permanent partial impairment of 13% in this compensable injury.

14. Dr. Sacha, Dr. Updike, and Dr. Gellrick all recommended some care after MMI.

CONCLUSIONS OF LAW

Permanent partial disability benefits are based on impairment ratings made pursuant to the revised third edition of the "American Medical Association Guides to the Evaluation of Permanent Impairment." The findings of the Division independent medical examiner may only be overcome by clear and convincing evidence. C.R.S. 8-42-107(8). Clear and convincing evidence is stronger than a preponderance, and it is evidence which renders a particular proposition highly probable and free from serious or

substantial doubt. To satisfy this burden, Claimant is required to show the ALJ that it is "highly probable" that Dr. Gellrick's rating is incorrect. *See Metro Moving & Storage Co. v. Gussert, 914 P.2d 411* (Colo. 1995).

Respondents have overcome the opinion of Dr. Gellrick, the DIME physician, by clear and convincing evidence. Claimant's headaches are associated with his shoulder and neck pain, and should not be rated as a separate neurologic disorder. The medical record and the opinions of other physicians do not support Dr. Gellrick's rating of a separate impairment rating for headache. Claimant's impairment for this compensable injury is limited to 13% of the cervical spine. Insurer is not liable for permanent partial disability benefits above that amount.

Where an injured worker reaches maximum medical improvement but requires periodic medical care to prevent his condition from deteriorating, it is permissible to leave medical benefits open subsequent to the final award. *Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988)*. Respondents admitted to only limited medical benefits after maximum medical improvement pursuant to the Final Admission. An admission of *Grover* medical benefits must be an open ended medical benefit and can not be limited.

Three physicians have recommended some care after MMI. Claimant has established that medical care is needed after MMI. Once claimant establishes the probability of a need for future treatment, the claimant is entitled to a general award of future medical benefits. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo.App. 1997). Respondents have the continuing right to challenge reasonable necessity of the medical treatment at any time. *Hanna v. Print Expediters*, 77 P.3d 863 (Colo.App. 2003).

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant permanent partial disability benefits based on an impairment of 13% of the whole person.
2. Insurer is liable for medical treatment after MMI.

DATED: *May 19, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-751-106

ISSUES

The following issues were raised for consideration at hearing:

1. Compensability;
2. Medical benefits;
3. Indemnity benefits; and
4. Average weekly wage (AWW).

At hearing, the parties stipulated that Claimant's AWW was $832.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the ALJ enters the following Findings of Fact.

1. In 2008, Claimant had been employed by the employer for 29 years. Claimant worked as an international customer associate.

2. On February 6, 2008, while at work for the Employer, Claimant testified that she exited her workplace for a designated outside smoking area for a cigarette break. The Employer allowed employees two 15-minute breaks per day and a lunch break.

3. In order for Claimant to move between her office and a designated smoking area, she was required to bypass a conveyor belt by descending a flight of stairs, walking underneath the conveyor, and then ascending another flight of stairs, to an exterior doorway. Both staircases are indoors. The staircases are referred to as the inner staircase and the outer staircase, the inner being closer to Claimant's office and the outer being adjacent to the exterior doorway.

4. On February 6, 2008, Claimant took a break from approximately 10:30 a.m. to 10:45 a.m. Claimant testified that she smoked with a fellow employee, Vigil, in the smoking area. Claimant claims that she complained to Vigil that the staircase was wet and a continual problem. Claimant did not call her co-worker at hearing to testify.

5. Claimant testified she was on her way back from the cigarette break and descending the outer staircase when she slipped from one stair to the next and caught herself on the railing. Claimant testified she did not fall, nor did she strike the ground or a stair. Claimant testified that she was "jolted". She testified that she returned to work. Claimant testified that the metal stairs were wet and the metal of the stairs was raised for traction. Claimant testified that it looked like someone had put water on the stairs as if to clean them. Claimant testified that there had been a puddle at the base of the outer staircase.

6. Vogel was called by Claimant to testify. Vogel testified that Claimant "seemed fine when she came in in the morning". Vogel did not offer testimony about the condition of the stairs on February 6, 2008 and she did not witness the alleged slip.

7. Claimant testified that, within an hour, she started feeling pain and her legs started going numb. Claimant informed her supervisor, Pachas, that she had discomfort and needed to see a physician. Claimant testified that when she reported to her supervisor Pachas she was not sure what's going on. Claimant did not report the alleged injury as a workers' compensation injury at that time.

8. Claimant left work at noon on February 6, 2008 and proceeded to the office of her Primary Care Provider (PCP), Belmar Family Medicine (Belmar). Claimant saw Family Nurse Practitioner (FNP), R. Thomas. FNP Thomas reported, "Patient has been experiencing low back pain with pain radiating into her right buttock and right thigh. This has been controlled fairly well by ibuprofen usage. However, in the last 24 hours the pain has intensified… Extremely uncomfortable, unable to find a comfortable position and the pain wakes her up at night." This medical record does not make mention of a work incident in the preceding hours. Handwritten notes for the February 6, 2008 visit indicate that the purpose of the visit was follow up for "cough and [right] leg pain".

9. Claimant testified that on February 6, 2008 she did not tell her PCP that she slipped on stairs at work that morning. Claimant testified variously that she did not tell the PCP of the alleged slip at work because she "wasn't sure that the slip on the stairs was the cause of the problem" and that she "was in extreme pain and couldn't think of anything."

10. Claimant called Supervisor Pachas the following day, February 7, 2008, and informed her that her personal physician's initial diagnosis was a bulged disc and Claimant related it to the alleged slip on the stairs. Pachas instructed Claimant to see the designated workers' compensation provider, Dr. Kerry Kamer, D.O. Claimant did not work February 7, 2008. Claimant had, in December 2007, prescheduled February 11-15, 2008 as vacation.

11. Claimant saw Dr. Kamer on February 8, 2008. Dr. Kamer's report details his communication with Claimant's PCP. The report states, "I also spoke with the PCP. The PCP reported that the patient had a history of similar low back and right leg discomfort 6/07… The PCP vaguely recalled the patient mentioning an initial onset of the symptoms 'the night before' (February 5, 2007). The PCP reported that the patient had not mentioned any injury event until February 7, 2008 when she phoned in and reported [the alleged incident]." Dr. Kamer determined that work-relatedness was unclear at that time.

12. A Belmar office note indicates that Claimant called on February 8, 2008. Claimant reportedly noted that she "did have slip at work[;] seeking work comp."

13. At Dr. Kamer's request, Claimant underwent x-rays of the lumbar spine. Dr. Audry Krosnowski read the films and concluded that they showed multi-level degenerative changes. An October 5, 2008 MRI corroborated the absence of a disc bulge or herniation and the presence of degenerative changes.

14. Claimant followed up with Dr. Kamer on February 14, 2008. Dr. Kamer's report indicates, "The patient notes reasonable improvement in the symptoms after ongoing treatment with her private PCP." Dr. Kamer reviewed the PCP's transcribed report and noted, "The 2/6/08 PCP dictation was reviewed, and it notes significant similar symptoms prior to the 2/6/08 workplace event." On that basis, Dr. Kamer determined that Claimant's condition was not work-related. Dr. Kamer released Claimant to regular work duties.

15. At hearing, Claimant "stipulate[d] that there were preexisting back problems". This history was noted in, among other places, the Select Physical Therapy report of February 20, 2008. That report noted Claimant's report of "a history of back pain on and off during the years…" Claimant testified that she had previously had back sprains. Claimant failed to indicate, in her responses to Respondents' interrogatories that she had a preexisting history of back pain. Supervisor Pachas testified that Claimant complained "once in a while" in normal conversation that her back was bothering her.

16. Claimant saw FNP Thomas on March 21, 2008. FNP Thomas reported that Claimant's low back pain had resolved and she was ready to go back to work, however, she reported excruciating pain and re-injury of a 2006 rib injury at the most recent physical therapy visit. Claimant's PCP ultimately released her to return to work ten days later on March 31, 2008.

17. Following Claimant's March 31, 2008 return to work, she did not seek treatment until September 2008. In October 2008, Claimant applied for and was awarded short-term disability benefits through November 10, 2008. Claimant testified that by October 2008 her "numbness was not going away". Alternatively, Claimant testified that her prosecution of a claim for workers' compensation benefits was because "The injury came back".

18. Supervisor Pachas testified describing the area where Claimant alleges she fell as "filthy", that the outer staircase was dirty and that it did not appear as though the stairs had been cleaned in recent memory.

19. Pachas testified that Claimant did not immediately report a work injury on February 6, 2008. Pachas credibly testified that Claimant said she did not feel very good and wanted to see her doctor. She further testified that she was not, at that point, under the impression that Claimant alleged an injury to her back at work. She testified that had known that Claimant alleged a work injury, she would have sent her to Employer's approved workers' compensation physician.

20. Pachas testified that the day following the alleged work injury Claimant reported a slip but not a fall. Pachas testified that Claimant reported slipping on the inner staircase, not the outer staircase.

22. Claimant was evaluated by Respondent's Independent Medical Examiner, Dr. Michael Janssen, on January 20, 2009. Dr. Janssen reviewed Claimant's October 2008 MRI, which he opined showed "age-related" degeneration, but no substantial extradural compressive pathology, no disc herniations, and no foraminal stenosis. Dr. Janssen found that Claimant had subjective symptoms of L5-S1 radiculopathy with no anatomical correlation. Dr. Janssen opined that there was a lack of evidence of a disc herniation or any anatomical injury. Dr. Janssen suspected possible peripheral neuropathy as an explanation for Claimant's symptoms. He concluded that Claimant's age-related degenerative disc disease and possible peripheral neuropathy were not directly correlated to the alleged injury of February 6, 2008. Dr. Janssen's opinion was deemed credible and persuasive.

CONCLUSIONS OF LAW

Having made the foregoing Findings of Fact, the following Conclusions of Law are entered.

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. An injury is said to have occurred during the course and scope of employment if the injury has its origin in the Claimant's job related duties and is sufficiently related thereto as to be considered part of the employee's service to the employer. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991). An injury arises out of employment if it is sufficiently related to the conditions and circumstances under which the employee gener-

ally performs her job functions such that the activity may reasonably be characterized as an incident of the employment, even if the activity is not a strict obligation of the employment and does not confer a specific benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996).

4. The Employer allowed workers two 15-minute breaks and a lunch break daily and provided a designated smoking area on the premises for employees who chose to smoke during their break periods. Therefore, at the time of the alleged injury, Claimant was engaged in the course and scope of employment. *Roache v. Industrial Commission,* 729 P.2d 991 (Colo. App. 1986).

5. Claimant attributes injury to an alleged slip without fall on February 6, 2008 on the outer staircase while returning to her desk from a cigarette break. The actual occurrence of a slip is in doubt. Nobody witnessed the alleged incident. Claimant and her supervisor, Pachas, testified that on the date of alleged injury, Claimant did not report a work-related injury. Instead, Pachas testified that Claimant reported that she did not feel well and wanted to see her doctor. Claimant corroborated that she did not report a work injury on February 6, 2008. Claimant gave no plausible explanation for her failure to notify Employer of the nature of the alleged injury, despite asking for leave to visit her PCP. Claimant's uncorroborated testimony regarding her communication with her co-worker Vigil about the status of the stairs immediately before the alleged incident, does not make it more likely that she suffered an incident as alleged. If anything, given the totality of the evidence and the Claimant's lack of credibility, the alleged evidence furthers the perception of Claimant's motive.

6. Within several hours of the alleged incident, Claimant sought medical attention from her PCP. The medical record of FNP Thomas is devoid of any mention of a work incident, despite the alleged injury having occurred just hours earlier. Claimant testified that she did not inform her PCP about a work injury at that initial visit. Claimant testified that she did not tell her PCP that she slipped on stairs at work that morning. Claimant testified variously that she did not tell the PCP of the alleged slip at work because she "wasn't sure that the slip on the stairs was the cause of the problem" and that she "was in extreme pain and couldn't think of anything." Claimant's multiple explanations as to why she did not initially tell her PCP of the alleged slip are not credible or persuasive.

7. Based on all of the facts, the ALJ concludes that the medical records contradict Claimant's allegation of an acute injury at approximately 10:45 a.m. on February 6, 2008. The medical records instead clearly support that Claimant suffered increasing symptoms from an underlying medical condition prior to reporting to work on February 6, 2008.

8. Independent Medical Examiner Dr. Michael Janssen opined that there was a lack of evidence of a disc herniation or any anatomical injury. Dr. Janssen suspected possible peripheral neuropathy as an explanation for Claimant's symptoms. He concluded that Claimant's age-related degenerative disc disease and possible peripheral

neuropathy were not directly correlated to the alleged injury of February 6, 2008. Dr. Janssen's opinion is deemed credible and persuasive.

9. The medical evidence and Claimant's supervisor's testimony was found to be more credible and persuasive than Claimant's testimony. Further, Respondents' evidence contradicted Claimant's testimony with regard to the mechanism of the injury. In sum, it is found that it is the totality of the contradictions and misstatements that lead to the conclusion that Claimant failed to sustain her burden.

10. Based on the totality of the evidence presented at hearing, it is found and concluded that Claimant failed to sustain her burden of proof to establish that she suffered a compensable injury on February 6, 2008. Claimant has failed to prove either the occurrence of an injury in the course and scope of employment or that any incident while in the course and scope of employment actually caused an injury.

11. Having found and concluded that the claim is not compensable, all other issues are moot.

ORDER

It is hereby ordered, as follows:

1. Claimant's claim for workers' compensation benefits is hereby denied and dismissed.

DATED: May 19, 2009

Margot W. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-754-412

ISSUE

Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties pursuant to §8-43-304, C.R.S. for Respondent's failure to obey a November 13, 2008 Summary Order issued by ALJ Broniak.

FINDINGS OF FACT

1. On October 22, 2008 ALJ Broniak conducted a hearing in the present matter. The issues presented at the hearing involved compensability, medical benefits, Temporary Total Disability (TTD) benefits and average weekly wage.

2. On November 13, 2008 ALJ Broniak issued a Summary Order based on the evidence presented at the hearing. She concluded that Claimant had suffered a compensable injury, was entitled to receive medical benefits and should be awarded TTD benefits in the amount of $450.00 per week. Instead of paying the compensation to Claimant, ALJ Broniak directed Employer to "[d]eposit the sum of $15,000 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded." Alternatively, ALJ Broniak ordered Employer to file a bond with the Division of Workers' Compensation (DOWC) within 10 days of the date of the Order.

3. Employer has neither deposited the sum of $15,000 nor filed a bond with the DOWC. Respondent has thus failed to comply with ALJ Broniak's November 13, 2008 Summary Order.

4. Because Respondent violated ALJ Broniak's Summary Order, Claimant has made a prima facie showing that Respondent's conduct was objectively unreasonable. Moreover, Respondent has failed to sustain its burden of persuasion to demonstrate that its conduct was reasonable under the circumstances.

5. Claimant has demonstrated that it is more probably true than not that Respondent violated ALJ Broniak's November 13, 2008 Summary Order and engaged in conduct that was objectively unreasonable. In considering the degree of reprehensibility of Respondent's conduct, the disparity between the actual or potential harm suffered by a party and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases, a penalty of $100 each day is appropriate. Employer continues to violate ALJ Broniak's Summary Order on each day it fails or refuses to pay the award. Employer is thus liable for a penalty award of $100 per day for each day it fails or refuses to pay the award from December 4, 2008 until paid. Seventy-five percent of the penalty shall be paid to Claimant and twenty-five percent of the penalty shall be paid to the Subsequent Injury Fund.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the

rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-43-304(1), C.R.S. is a general penalty provision under the Act that authorizes the imposition of penalties up to $500 per day where a party violates a statute, rule, or lawful order of an ALJ. *Holliday v. Bestop, Inc.,* 23 P.3d 700, 705, 706 (Colo. 2001). An award of penalties shall be paid 75% to the aggrieved party and 25% to the Subsequent Injury Fund. §8-43-304(1), C.R.S.

5. The imposition of penalties under §8-43-304(1) requires a two-step analysis. *See In Re Hailemichael,* W.C. No. 4-382-985 (ICAP Nov. 17, 2004). The ALJ must first determine whether the disputed conduct violated a provision of the Act or rule. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623, 624 (Colo. App. 1995). If a violation has occurred, penalties may only be imposed if the ALJ concludes that the violation was objectively unreasonable. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 907 P.2d 676, 678-79 (Colo. App. 1995). The reasonableness of a violator's actions depends upon whether the action was predicated on a "rational argument based on law or fact." *In re Lamutt,* W.C. No. 4-282-825 (ICAP, Nov. 6, 1998). There is no requirement that the violator knew that its actions were unreasonable. *Pueblo School Dist. No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

6. The question of whether a person acted in an objectively reasonable manner when violating an order presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005). The party seeking imposition of a penalty establishes a prima facie showing of unreasonable conduct by proving there was a violation of an order. *Id.* If such a prima facie showing is made, the burden of persuasion shifts to the alleged violator to show that her conduct was reasonable under the circumstances. *Id.*; *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999).

7. In ascertaining an appropriate penalty the ALJ may consider a "wide variety of factors." *Adakai v. St. Mary Corwin Hospital,* W.C. No. 4-619-954 (ICAP, May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is

"grossly disproportionate" to the conduct in question. *See id.* When determining the penalty an ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by a party and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products v. Industrial Claim Appeals Office,* 126 P.3d 323 (Colo. App. 2005). Subject to constitutional limitations, an ALJ's decision regarding the amount of a penalty "remains highly discretionary." *In Re Evans,* No. 4-730-531 (ICAP, Nov. 10, 2008).

8. As found, Claimant has demonstrated by a preponderance of the evidence that Respondent violated ALJ Broniak's November 13, 2008 Summary Order and engaged in conduct that was objectively unreasonable. In considering the degree of reprehensibility of Respondent's conduct, the disparity between the actual or potential harm suffered by a party and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases, a penalty of $100 each day is appropriate. Employer continues to violate ALJ Broniak's Summary Order on each day it fails or refuses to pay the award. Employer is thus liable for a penalty award of $100 per day for each day it fails or refuses to pay the award from December 4, 2008 until paid. Seventy-five percent of the penalty shall be paid to Claimant and twenty-five percent of the penalty shall be paid to the Subsequent Injury Fund.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Employer shall pay a penalty of $100 per day for each day it fails or refuses to pay the award from December 4, 2008 until paid. Seventy-five percent of the penalty shall be paid to Claimant and twenty-five percent of the penalty shall be paid to the Subsequent Injury Fund.

2. Any issues not resolved in this Order are reserved for future determination.

DATED: May 29, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-759-309

ISSUES

Whether Claimant's permanent impairment should be determined as a scheduled impairment of the hand or, a scheduled impairment of the upper extremity.

Whether Claimant is entitled to additional compensation for disfigurement under Section 8-42-108(2)(c), C.R.S.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. Claimant sustained an admitted injury to the index and middle fingers of his right hand on May 12, 2008 while employed by Employer. On the date of injury, Claimant's right had became caught in the conveyor of a sod harvesting machine. As a result, Claimant suffered traumatic amputation of the right index finger at the distal interphalangeal joint and of the right long finger at the proximal interphalangeal joint.

2. Following the injury, Claimant was taken to North Colorado Medical Center where surgery was performed by Dr. Sides consisting of debridement and irrigation of the right index and long finger wounds and revision amputation with advancement flap of the index and long fingers.

3. After surgery, Claimant underwent post-operative treatment at Greeley Medical Center where Dr. Thomas Lynch became the authorized treating physician.

4. At an evaluation on July 25, 2008 Dr. Lynch placed Claimant at maximum medical improvement and performed an impairment evaluation. Dr. Lynch noted that Claimant reported only minimal discomfort in the stumps of the involved fingers. Dr. Lynch noted obvious loss of the distal portions of the index and middle fingers of the right hand.

5. On July 25, 2008 Dr. Lynch measured the range of motion of the Claimant's right index finger using the goniometer method and found Claimant to have 30% impairment from lost range of motion. In addition, Claimant had a 40% impairment of the index finger from amputation. Dr. Lynch also measured the range of motion of the long finger using the goniometer method and found 17% impairment from lost range of motion and 80% impairment from amputation. Dr. Lynch rated Claimant as having a 58% impairment of the index finger and 83% impairment of the long finger. The finger impairments caused impairment of the hand of 12% and 17% respectively resulting in a combined impairment to the hand of 29% from the index and long finger amputations.

6. Claimant's injured right hand is bothered by cold conditions. Claimant will experience pain going up into the right arm if he hits the right hand. Claimant has difficulties with gripping, writing and driving with the right hand. The Claimant is right hand dominant.

7. Claimant's right arm will get tired in the forearm with activities such as throwing a ball to his children for more than 15 minutes. Claimant experiences a sensation of his right arm falling asleep with driving longer than ½ hour.

8. Claimant did not have symptoms in his right arm at the time he was evaluated for permanent impairment by Dr. Lynch on July 25, 2008.

9. Claimant has disfigurement of his right hand that is normally exposed to public view from the partial amputations at the index and long finger. Claimant's right index finger has a stump from the amputation that is clubbed in appearance at the end and is markedly lighter in color than the surrounding skin. Claimant's right long finger has a stump from the amputation that is clubbed in appearance at the end and is markedly lighter in color than the surrounding skin. Claimant suffers from disfigurement of his right hand from stumps due to loss or partial loss of limbs.

10. Claimant was seen by Dr. Raymond Van Den Hoven on January 12, 2009. Claimant reported to this physician that the predominant source of his complaints was the right hand. Claimant did describe to the physician numbness and tingling in the hand up to the elbow mostly at night and with driving. Dr. Van Den Hoven recommended an EMG to evaluate possible bilateral carpal tunnel symdrome.

11. Although Claimant experience symptoms of numbness or tingling in the right arm and sensations of his arm falling asleep, the ALJ finds that Claimant has not proven that these symptoms have resulted in an impairment of function of the arm above the hand.

12. Respondents filed a Final Admission dated August 8, 2008 admitting for 29% impairment of the hand at the wrist. Respondents also admitted for $800.00 in disfigurement benefits.

13. Claimant has sustained 29% impairment of the right hand as result of his amputation injuries to the right index and long fingers occurring on May 12, 2008. Claimant has failed to prove by a preponderance of the evidence that he has sustained impairment above the level of the hand.

CONCLUSIONS OF LAW

14. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

15. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving en-

titlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers compensation claim shall be decided on its merits. Section 8-43-201 (2008) C.R.S.

16. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

17. WCRP 12-6(b) provides that when an injury causes the partial loss of use of any member specified in the scheduled injuries, as set forth in Section 8-42-107(2), C.R.S., the physician shall use the most distal body part. The most distal body part is the body part farthest away from the central body.

18. WCRP 12-6(c) provides that in calculating partial loss-of-use benefits, the most distal permanent impairment rating provided by the physician shall be multiplied by the number of weeks corresponding to the scheduled injury for the appropriate entire finger, whole hand, or whole upper extremity… then multiplied by the amount pursuant to Section 8-42-107(6), C.R.S.

19. A preponderance of evidence standard applies to the determination of scheduled impairment ratings. *Delaney v. Indus. Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2000). Claimant seeks an award of scheduled impairment of 26% of the upper extremity based upon the conversion of his 29% hand impairment as reflected in Dr. Lynch's report of July 25, 2008. Claimant bears the burden to prove by a preponderance of the evidence that he has sustained an impairment of the upper extremity above the level of the hand. The ALJ finds and concludes that Claimant has failed to sustain his burden of proof.

20. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 803 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). In addition, WCRP 12-6(b) and (c) require that the rating be to the most distal body part and then that rating applied to the appropriate entire finger, hand or whole upper extremity. Dr. Lynch used the most distal body part, the fingers, in performing his

impairment evaluation. The ALJ concludes that in this case it is appropriate to use the whole hand for purposes of WCRP 12-6(c) as the Claimant experiences functional impairment of the hand for activities such as gripping and writing that go beyond impairment of the fingers. See, *Menk v. Sally Beauty Company,* W. C. No. 4-185-360 (February 8, 1996). Additionally, Respondents have not argued that the impairment should be limited to the fingers as opposed to the hand and have requested that their admission of 29% of the hand be adopted by the ALJ.

21. Pain and discomfort that restricts a Claimant's ability to use a portion of the body may be considered in determining the level of impairment. See, *Salaz v. Phase II Co.,* W.C. No. 4-240-376 (November 19, 1997). Although Claimant experiences numbness or tingling in his right arm above the hand or sensations of falling asleep in the upper arm the Claimant has failed to prove that these symptoms restrict the use of the arm. As a result, such symptoms do not support a finding of impairment above the level of the hand as admitted by Respondents.

22. Respondents admitted for $800.00 in disfigurement benefits. The ALJ finds and concludes that as a result of his disfigurement Claimant is entitled to additional compensation under Section 8-42-108(2)(c). Section 8-42-108(2), C.R.S. provides:

> If an employee sustains any of the following disfigurements, the director may allow up to eight thousand dollars as compensation to the employee in addition to all other compensation benefits provided in this article other than compensation allowed under subsection (1) of this section:
>
> (a) Extensive facial scars or facial burn scars;
> (b) Extensive body scars or burn scars; or
> (c) Stumps due to loss or partial loss of limbs.

The ALJ finds and concludes that Claimant is entitled to $4,800.00 for his disfigurement, with Respondents being entitled to a credit for any previously admitted and paid disfigurement benefits.

ORDER

It is therefore ordered that:

1. Claimant's claim for permanent impairment of 26% of the upper extremity is denied and dismissed. Respondents shall be liable to Claimant for 29% impairment of the hand as admitted in the August 8, 2008 Final Admission.

2. Respondents shall pay Claimant, in one lump sum, the amount of $4,800.00 for Claimant's disfigurement. Respondents are entitled to a credit for any amount of previously admitted and paid disfigurement benefits.

The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

DATED: May 20, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-759-309

ISSUES

Whether Claimant's permanent impairment should be determined as a scheduled impairment of the hand or, a scheduled impairment of the upper extremity.

Whether Claimant is entitled to additional compensation for disfigurement under Section 8-42-108(2)(c), C.R.S.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. Claimant sustained an admitted injury to the index and middle fingers of his right hand on May 12, 2008 while employed by Employer. On the date of injury, Claimant's right had became caught in the conveyor of a sod harvesting machine. As a result, Claimant suffered traumatic amputation of the right index finger at the distal interphalangeal joint and of the right long finger at the proximal interphalangeal joint.

2. Following the injury, Claimant was taken to North Colorado Medical Center where surgery was performed by Dr. Sides consisting of debridement and irrigation of the right index and long finger wounds and revision amputation with advancement flap of the index and long fingers.

3. After surgery, Claimant underwent post-operative treatment at Greeley Medical Center where Dr. Thomas Lynch became the authorized treating physician.

4. At an evaluation on July 25, 2008 Dr. Lynch placed Claimant at maximum medical improvement and performed an impairment evaluation. Dr. Lynch noted that Claimant reported only minimal discomfort in the stumps of the involved fingers. Dr. Lynch noted obvious loss of the distal portions of the index and middle fingers of the right hand.

5. On July 25, 2008 Dr. Lynch measured the range of motion of the Claimant's right index finger using the goniometer method and found Claimant to have 30% impairment from lost range of motion. In addition, Claimant had a 40% impairment of

the index finger from amputation. Dr. Lynch also measured the range of motion of the long finger using the goniometer method and found 17% impairment from lost range of motion and 80% impairment from amputation. Dr. Lynch rated Claimant as having a 58% impairment of the index finger and 83% impairment of the long finger. The finger impairments caused impairment of the hand of 12% and 17% respectively resulting in a combined impairment to the hand of 29% from the index and long finger amputations.

6. Claimant's injured right hand is bothered by cold conditions. Claimant will experience pain going up into the right arm if he hits the right hand. Claimant has difficulties with gripping, writing and driving with the right hand. The Claimant is right hand dominant.

7. Claimant's right arm will get tired in the forearm with activities such as throwing a ball to his children for more than 15 minutes. Claimant experiences a sensation of his right arm falling asleep with driving longer than ½ hour.

8. Claimant did not have symptoms in his right arm at the time he was evaluated for permanent impairment by Dr. Lynch on July 25, 2008.

9. Claimant has disfigurement of his right hand that is normally exposed to public view from the partial amputations at the index and long finger. Claimant's right index finger has a stump from the amputation that is clubbed in appearance at the end and is markedly lighter in color than the surrounding skin. Claimant's right long finger has a stump from the amputation that is clubbed in appearance at the end and is markedly lighter in color than the surrounding skin. Claimant suffers from disfigurement of his right hand from stumps due to loss or partial loss of limbs.

10. Claimant was seen by Dr. Raymond Van Den Hoven on January 12, 2009. Claimant reported to this physician that the predominant source of his complaints was the right hand. Claimant did describe to the physician numbness and tingling in the hand up to the elbow mostly at night and with driving. Dr. Van Den Hoven recommended an EMG to evaluate possible bilateral carpal tunnel symdrome.

11. Although Claimant experience symptoms of numbness or tingling in the right arm and sensations of his arm falling asleep, the ALJ finds that Claimant has not proven that these symptoms have resulted in an impairment of function of the arm above the hand.

12. Respondents filed a Final Admission dated August 8, 2008 admitting for 29% impairment of the hand at the wrist. Respondents also admitted for $800.00 in disfigurement benefits.

13. Claimant has sustained 29% impairment of the right hand as result of his amputation injuries to the right index and long fingers occurring on May 12, 2008. Claimant has failed to prove by a preponderance of the evidence that he has sustained impairment above the level of the hand.

CONCLUSIONS OF LAW

14. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

15. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers compensation claim shall be decided on its merits. Section 8-43-201 (2008) C.R.S.

16. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When considering credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

17. WCRP 12-6(b) provides that when an injury causes the partial loss of use of any member specified in the scheduled injuries, as set forth in Section 8-42-107(2), C.R.S., the physician shall use the most distal body part. The most distal body part is the body part farthest away from the central body.

18. WCRP 12-6(c) provides that in calculating partial loss-of-use benefits, the most distal permanent impairment rating provided by the physician shall be multiplied by the number of weeks corresponding to the scheduled injury for the appropriate entire finger, whole hand, or whole upper extremity… then multiplied by the amount pursuant to Section 8-42-107(6), C.R.S.

19. A preponderance of evidence standard applies to the determination of scheduled impairment ratings. *Delaney v. Indus. Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2000). Claimant seeks an award of scheduled impairment of 26% of the upper extremity based upon the conversion of his 29% hand impairment as reflected in Dr. Lynch's report of July 25, 2008. Claimant bears the burden to prove by a prepon-

derance of the evidence that he has sustained an impairment of the upper extremity above the level of the hand. The ALJ finds and concludes that Claimant has failed to sustain his burden of proof.

20. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 803 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). In addition, WCRP 12-6(b) and (c) require that the rating be to the most distal body part and then that rating applied to the appropriate entire finger, hand or whole upper extremity. Dr. Lynch used the most distal body part, the fingers, in performing his impairment evaluation. The ALJ concludes that in this case it is appropriate to use the whole hand for purposes of WCRP 12-6(c) as the Claimant experiences functional impairment of the hand for activities such as gripping and writing that go beyond impairment of the fingers. See, *Menk v. Sally Beauty Company,* W. C. No. 4-185-360 (February 8, 1996). Additionally, Respondents have not argued that the impairment should be limited to the fingers as opposed to the hand and have requested that their admission of 29% of the hand be adopted by the ALJ.

21. Pain and discomfort that restricts a Claimant's ability to use a portion of the body may be considered in determining the level of impairment. See, *Salaz v. Phase II Co.,* W.C. No. 4-240-376 (November 19, 1997). Although Claimant experiences numbness or tingling in his right arm above the hand or sensations of falling asleep in the upper arm the Claimant has failed to prove that these symptoms restrict the use of the arm. As a result, such symptoms do not support a finding of impairment above the level of the hand as admitted by Respondents.

22. Respondents admitted for $800.00 in disfigurement benefits. The ALJ finds and concludes that as a result of his disfigurement Claimant is entitled to additional compensation under Section 8-42-108(2)(c). Section 8-42-108(2), C.R.S. provides:

> If an employee sustains any of the following disfigurements, the director may allow up to eight thousand dollars as compensation to the employee in addition to all other compensation benefits provided in this article other than compensation allowed under subsection (1) of this section:
>
> (a) Extensive facial scars or facial burn scars;
>
> (b) Extensive body scars or burn scars; or
>
> (d) Stumps due to loss or partial loss of limbs.

The ALJ finds and concludes that Claimant is entitled to $4,800.00 for his disfigurement, with Respondents being entitled to a credit for any previously admitted and paid disfigurement benefits.

ORDER

It is therefore ordered that:

1. Claimant's claim for permanent impairment of 26% of the upper extremity is denied and dismissed. Respondents shall be liable to Claimant for 29% impairment of the hand as admitted in the August 8, 2008 Final Admission.

2. Respondents shall pay Claimant, in one lump sum, the amount of $4,800.00 for Claimant's disfigurement. Respondents are entitled to a credit for any amount of previously admitted and paid disfigurement benefits.

The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

DATED: May 20, 2009

Ted A. Krumreich
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-759-720

ISSUES

The issue for determination involves Claimant's request for a change of physician from Dr. Feinsinger to Dr. McLaughlin.

FINDINGS OF FACT

1. Claimant is employed by Respondent's store located in Rifle, Colorado. Claimant currently lives in Clifton, Colorado and has lived in Clifton since her date of injury.

2. Claimant suffered an admitted compensable injury to her low back on January 28, 2008. Claimant was initially referred to Dr. Brokering in Glenwood Springs, Colorado for treatment. Dr. Brokering provided Claimant with work restrictions and employer was able to accommodate Claimant's work restrictions. Dr. Brokering also prescribed physical therapy in February 2008. Claimant's physical therapy was performed in Rifle, Colorado. Dr. Brokering also referred Claimant to Dr. Hahn for epidural steroid injections in March 2008.

3. Dr. Brokering eventually referred the Claimant to Dr. Corenman for a surgical consultation in June 2008. Dr. Corenman recommended a diskogram that was performed on July 24, 2008. Based on the results of the diskogram and a CT scan, Dr. Corenman opined that Claimant was a candidate for fusion surgery at the L3-4 and L4-5 levels.

4. Claimant was eventually taken off of work completely by Dr. Brokering on October 15, 2008. Respondents began paying temporary total disability benefits on October 22, 2008 and have continued those payments through the present time.

5. Claimant's care was transferred from Dr. Brokering to Dr. Feinsinger in December, 2008. Dr. Feinsinger first examined Claimant on December 12, 2008. Dr. Feinsinger noted in his initial evaluation that Claimant had not worked for the past 2 months because apparently Dr. Brokering felt Claimant should not be driving from "Grand Junction to her workplace in Rifle, particularly when she was on narcotics and also because driving that far seemed to worsen her symptoms."

6. Claimant eventually underwent the surgery proposed by Dr. Corenman in April 2009. Claimant has not returned to work being taken off of work by Dr. Brokering in October 2008.

7. Claimant testified that to attend appointments with Dr. Feinsinger, she is required to travel 45 miles one way. Claimant testified she would like to treat with Dr. McLaughlin, noting that Dr. McLaughlin was an authorized provider for employer and located only 7.6 miles from her home in Clifton. Claimant testified that while she was working in Rifle, her treatment with Dr. Brokering and the physical therapy could be arranged in conjunction with her work schedule. Since Claimant is off work completely, Claimant testified she needs to make arrangements to have a family member drive her to her medical appointments.

8. Claimant also testified that Dr. Feinsinger issued reports opining that the surgery proposed by Dr. Corenman was not appropriate. Claimant testified that the relationship between herself and Dr. Feinsinger has broken down.

9. The ALJ finds the testimony of the Claimant credible. Claimant has proven by a preponderance of the evidence that she is entitled to a change of physician.

CONCLUSIONS OF LAW

1. Upon proper showing to the division, the employee may procure its permission at any time to have a physician of the employee's selection attend said employee. Section 8-43-404(5)(a)(VI), *supra.* Where an employee has been receiving adequate medical treatment, courts are reluctant to allow a change in physician. *See Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (ICAO December 5, 1995) (ICAO affirmed ALJ's refusal to order a change of physician when the ALJ found claimant receiving proper medical care); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (ICAO August 23, 1995) (ICAO affirmed ALJ's refusal to order a change of physician where physician could provide additional reasonable and necessary medical care claimant might require); and *Guynn v. Penkhus Motor Co.*, W.C. No. 3-851-012 (ICAO June 6, 1989) (ICAO affirmed ALJ's denial of change of physician where ALJ found claimant failed to prove inadequate treatment provided by claimant's authorized treating physician). In deciding whether to grant a change in physician, the ALJ should consider the need to insure that the claimant is provided with reasonable

and necessary medical treatment as required by § 8-42-101(1), *supra*, while also protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be held liable. *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (ICAO 11/27/07); s*ee Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999). Moreover, the ALJ is not required to approve a change in physician because of a claimant's personal reasons, including mere dissatisfaction. *See Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

2. In this case, the ALJ finds that the distance between Claimant's residence in Clifton, Colorado to the offices of Dr. Feinsinger represent a significant hurdle to Claimant receiving medical care. Claimant must arrange for transportation for a ninety (90) mile round trip drive for each doctor's appointment. The ALJ also finds that Dr. McLaughlin is an authorized provider for employer. Therefore, authorizing Dr. McLaughlin is reasonable insofar as Respondent's ability to be apprised of the course of treatment is likewise protected. The ALJ finds that Claimant has made a proper showing to change the authorized physician to attend to Claimant from Dr. Feinsinger to Dr. McLaughlin.

ORDER

It is therefore ordered that:

1. Claimant's request for a change of treating physician to Dr. McLaughlin in granted.

All matters not determined herein are reserved for future determination.

DATED: May 21, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-763-944

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits or Temporary Partial Disability (TPD) benefits for the period August 15, 2008 until October 20, 2008.

2. A determination of Claimant's Average Weekly Wage (AWW).

3. Whether Claimant has presented substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the ef-

fects of his industrial injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

4. Whether Claimant is entitled to a disfigurement award pursuant to §8-42-108, C.R.S.

STIPULATIONS

The parties have agreed to the following:

1. Claimant earned an AWW of $667.57 while working for Employer.

2. A PERA offset in the amount of $309.25 per week should be applied against any disability benefits awarded to Claimant.

FINDINGS OF FACT

1. Claimant worked for Employer pursuant to several contracts. His duties included substitute teaching, assisting a morning teacher and night instruction. Claimant did not work for Employer during the summer months.

2. On May 19, 2008 Claimant suffered an admitted industrial injury to his left arm during the course and scope of his employment with Employer. Claimant lifted a trash barrel in order to empty trash into a dumpster and experienced a "pop" in his left elbow.

3. Claimant initially received medical treatment for his industrial injury from Authorized Treating Physician (ATP) Annu Ramaswamy, M.D. On May 20, 2008 Dr. Ramaswamy restricted Claimant from lifting in excess of five pounds with his left arm.

4. On the date of Claimant's injury he maintained concurrent employment. He worked for Integrated Building Services performing general parking lot cleaning duties. Claimant typically swept the lot and emptied trash containers. He earned an AWW of $80.00.

5. Claimant also maintained a business in which he hauled various materials to recycling facilities. He used a winch system to retrieve heavy materials so that he was not required to engage in heavy lifting.

6. Claimant explained that his scrap-hauling duties increased during the summer months because he did not work for Employer. He submitted documentation reflecting receipts from his recycling business for the years 2005-2008. Claimant explained that his income from the recycling business varied dramatically depending on the price of scrap materials. From June through October 2007 Claimant earned $2435.80 from his recycling business. However, Claimant explained that the price of scrap "skyrocketed" in 2008. In fact, Claimant earned more from his scrap business in May 2008 than in any other single month in which he operated the business.

7. Because of the wide fluctuations in the price of scrap materials, Claimant's earnings during the summer of 2007 yield a fair approximation of his wage loss and diminished earning capacity subsequent to his May 19, 2008 industrial injury. There are 153 days in the months June through October. Dividing $2,435.80 by 153 yields $15.92 each day. Multiplying $15.92 times seven yields an AWW of $111.44 from Claimant's scrap-hauling business.

8. Because of persistent left arm pain Claimant underwent an elbow MRI on June 11, 2008. The MRI revealed a rupture of the distal biceps tendon.

9. Dr. Ramaswamy referred Claimant to Craig A. Davis, M.D. Dr. Davis determined that Claimant required surgical intervention to repair his left distal biceps tendon. On July 16, 2008 Claimant underwent surgery for his left arm condition. Claimant explained that he was subsequently unable to work for several weeks.

10. On August 15, 2008 Employer offered Claimant a new contract for the following school year. Pursuant to the contract Claimant would earn $25.00 per hour for seven hours of work each week. However, Claimant rejected the contract offer. He did not state that the job duties would violate his work restrictions but instead explained that he rejected the offer because of the limited number of work hours offered by Employer. Claimant would have earned an AWW of $175.00 per week if he had accepted Employer's job offer.

11. On September 10, 2008 Claimant began working for HR Staffing as an auction car driver. He earned $7.02 per hour for four hours of work each week. Claimant thus earned an AWW of $28.08.

12. On September 29, 2008 Dr. Ramaswamy released Claimant to work as long as he did not lift in excess of 30 pounds. On October 20, 2008 Dr. Ramaswamy permitted Claimant to return to full-duty employment.

13. On October 28, 2008 Dr. Ramaswamy determined that Claimant had reached Maximum Medical Improvement (MMI). He did not impose any permanent restrictions or assign Claimant a permanent impairment rating. Dr. Ramaswamy did not recommend medical maintenance treatment other than a home exercise program.

14. Claimant testified at the hearing in this matter. He stated that he seeks additional medical benefits to maintain his condition. Claimant noted that his left arm condition periodically worsens.

15. Claimant underwent a disfigurement evaluation at the hearing. As a result of his left arm surgery, Claimant incurred disfigurement consisting of two one and one-half inch scars on his left arm and elbow. There are also approximately nine to ten small, white dots from stitches near Claimant's left elbow. The disfigurement is serious, permanent, and normally exposed to public view. Claimant is thus entitled to a total disfigurement award of $500.00.

16. Claimant has established that it is more probably true than not that he is entitled to TTD or TPD benefits during the period August 15, 2008 through October 20, 2008. He has demonstrated that his May 19, 2008 industrial injury caused a disability that contributed to a subsequent wage loss.

17. The record reveals that Claimant was engaged in concurrent employment while working for Employer. His stipulated AWW of $667.57 should thus be increased by the $80.00 AWW that he earned while working for Integrated Building Services. Moreover, his AWW should also be increased by the AWW of $111.44 that he earned while pursuing his scrap-hauling business. Claimant's total AWW was thus $859.01.

18. On August 15, 2008 Employer offered Claimant a new contract for the following school year in which he would have earned an AWW of $175.00. Claimant rejected the contract offer. He did not state that the job duties would violate his work restrictions but instead explained that he rejected the offer because of the limited number of work hours offered by Employer. Claimant's industrial injury thus did not impair his earning capacity and contribute to a wage loss of $175.00 each week. Claimant's potential AWW of $175.00 should therefore be subtracted from his award of disability benefits. Claimant's thus earned an AWW of $684.01.

19. On September 10, 2008 Claimant began earning an AWW of $28.08 while working for HR Staffing as an auction car driver. Accordingly, beginning on September 10, 2008 additional earnings of $28.08 each week should be subtracted from Claimant's disability benefits. A total of $203.08 should thus be subtracted from Claimant's AWW of $859.01. Accordingly, Claimant earned a total AWW of $655.93 beginning on September 10, 2008.

20. The parties also stipulated that a PERA offset in the amount of $309.25 per week should be applied against any disability benefits awarded to Claimant.

21. Claimant has failed to present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition. Claimant noted that his left arm condition periodically worsens and he would benefit from additional medical treatment. However, Dr. Ramaswamy did not recommend medical maintenance treatment other than a home exercise program. Claimant's testimony is insufficient to support a request for additional medical maintenance benefits.

22. As a result of Claimant's left arm surgery he incurred disfigurement consisting of two one and one-half inch scars on his left arm and elbow. There are also approximately nine to ten small, white dots from stitches near Claimant's left elbow. The disfigurement is serious, permanent, and normally exposed to public view. Claimant is thus entitled to a total disfigurement award of $500.00.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

TTD and TPD Benefits

4. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To prove entitlement to TPD benefits, a claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

5. As found, Claimant has established by a preponderance of the evidence that he is entitled to TTD or TPD benefits during the period August 15, 2008 through October 20, 2008. He has demonstrated that his May 19, 2008 industrial injury caused a disability that contributed to a subsequent wage loss.

AWW

6. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007). An ALJ thus has authority to calculate an AWW based on wages earned through concurrent employment. *In Re Prescott,* W.C. No. 4-581-518 (ICAP, Aug.11, 2006).

7. As found, the record reveals that Claimant was engaged in concurrent employment while working for Employer. His stipulated AWW of $667.57 should thus be increased by the $80.00 AWW that he earned while working for Integrated Building Services. Moreover, his AWW should also be increased by the AWW of $111.44 that he earned while pursuing his scrap-hauling business. Claimant's total AWW was thus $859.01.

8. As found, on August 15, 2008 Employer offered Claimant a new contract for the following school year in which he would have earned an AWW of $175.00. Claimant rejected the contract offer. He did not state that the job duties would violate his work restrictions but instead explained that he rejected the offer because of the limited number of work hours offered by Employer. Claimant's industrial injury thus did not impair his earning capacity and contribute to a wage loss of $175.00 each week. Claimant's potential AWW of $175.00 should therefore be subtracted from his award of disability benefits. Claimant's thus earned an AWW of $684.01.

9. As found, on September 10, 2008 Claimant began earning an AWW of $28.08 while working for HR Staffing as an auction car driver. Accordingly, beginning on September 10, 2008 additional earnings of $28.08 each week should be subtracted from Claimant's disability benefits. A total of $203.08 should thus be subtracted from Claimant's AWW of $859.01. Accordingly, Claimant earned a total AWW of $655.93 beginning on September 10, 2008.

10. As found, the parties also stipulated that a PERA offset in the amount of $309.25 per week should be applied against any disability benefits awarded to Claimant.

Grover Medical Benefits

11. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

12. As found, Claimant has failed to present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition. Claimant noted that his left arm condition periodically worsens and he would benefit from additional medical treatment. However, Dr. Ramaswamy did not recommend medical maintenance treatment other than a home exercise program. Claimant's testimony is insufficient to support a request for additional medical maintenance benefits.

Disfigurement

13. Section 8-42-108, C.R.S. provides that a claimant may obtain additional compensation if she is seriously disfigured as the result of an industrial injury. As found, as a result of Claimant's left arm surgery he incurred disfigurement consisting of two one and one-half inch scars on his left arm and elbow. There are also approximately nine to ten small, white dots from stitches near Claimant's left elbow. The disfigurement is serious, permanent, and normally exposed to public view. Claimant is thus entitled to a total disfigurement award of $500.00.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is entitled to TTD or TPD benefits for the period August 15, 2008 through October 20, 2008.

2. Between August 15, 2008 and September 9, 2008 Claimant earned an AWW of $684.01. Between September 10, 2008 and October 20, 2008 Claimant earned an AWW of $655.93.

3. Respondents are entitled to a PERA offset in the amount of $309.25 per week against the disability benefits awarded to Claimant.

4. Claimant's request for additional medical maintenance benefits is denied and dismissed.

5. Claimant is entitled to a disfigurement award in the amount of $500.00.

6. Any issues not resolved in this order are reserved for future determination.

DATED: May 21, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-765-692

STATUTORY CONTEXT OF THE CLAIM

Claimant, a firefighter, brings this claim under the Workers' Compensation Act of Colorado, §§8-40-101, *et seq.*, C.R.S. (2008). Section 8-41-209, *supra*, provides the following coverage for occupational diseases contracted by firefighters:

> (1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system hematological system or genitourinary system and resulting from his or her employment as a firefighter, shall be considered an occupational disease.
>
> (2) Any condition or impairment of health described in subsection (1) of this section:
>
> (a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter; and

(b) Shall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job.

ISSUES

¬ Did respondents show by a preponderance of the medical evidence that claimant's prostate cancer was proximately caused by a hazard or exposure outside of his employment as a combat firefighter?

¬ Did claimant prove by a preponderance of the evidence that he is entitled to medical and temporary disability benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

Employer is a political subdivision operating a regional firefighting authority that serves a population of some 170,000 people. Claimant's date of birth is January 28, 1955; his age at the time of hearing was 54 years. Claimant underwent a pre-employment physical for employer on January 19, 1979. On February 1, 1979, claimant started working as a firefighter for employer; his age then was 24 years. Claimant has worked for some 30 years for employer and has held the rank of captain for some 9 years. The Judge adopts the parties' stipulation in finding claimant's average weekly wage (AWW) is $1,346.15. Claimant's testimony at hearing was credible and persuasive.

In April of 2008, Michael R. Lee, D.O., diagnosed claimant with prostate cancer, a cancer of the genitourinary system. The Judge adopts the stipulation of the parties in finding that claimant meets the threshold requirements of §8-41-209: Claimant completed five or more years of employment as a firefighter. At the time employer hired him, claimant underwent a physical examination that failed to reveal substantial evidence of pre-existing prostate cancer. Claimant's prostate cancer is a cancer of the genitourinary system and meets the definition of a health condition considered an occupational disease under §8-41-209(1). Applying §8-41-209(2)(a) and (b), claimant's prostate cancer is presumed to have resulted from his work as a firefighter for employer. Respondents thus shoulder the burden of showing it more probably true that claimant's prostate cancer did not arise out of an occupational exposure from his work as a firefighter.

Claimant reported his diagnosis of prostate cancer to employer. Employer filed a first report of injury and referred him to Michael Holthouser, M.D. Dr. Holthouser evaluated claimant on May 12, 2008. Dr. Holthouser specializes in occupational medicine. There

was no persuasive evidence otherwise showing that Dr. Holthouser has any experience or training in diagnosing or treating prostate or any type of cancer. Dr. Holthouser applied the language of §8-41-209 and determined claimant's prostate cancer work-related.

Dr. Lee performed laparoscopic surgery upon claimant on June 23, 2008. As a result of surgery and treatment for prostate cancer, claimant missed approximately 4 months from work. Claimant then returned to full-time work as a firefighter.

Claimant has a family history of prostate cancer. Claimant's father was diagnosed with prostate cancer some 10 years ago at age 68. Claimant's only brother, his younger, was diagnosed with prostate cancer at age 49, shortly after claimant was diagnosed. Claimant thus has two relatives in the first degree diagnosed with prostate cancer. Neither claimant's father nor brother have worked as a firefighter.

After learning of his diagnosis, claimant contacted some 150 fellow firefighters by email, suggesting that they be tested for prostate cancer. Claimant was unaware which, if any, of his fellow firefighters followed his advice to get tested. Claimant was unaware whether any of those firefighters have been diagnosed with prostate cancer.

Claimant is stationed in the ladder division where he has been engaged in significant firefighting suppression activity. Between January 1, 2003, and November 2008, claimant had been dispatched to fight three hundred and sixty nine (369) fires, twenty nine (29) ruptures, explosions, or overheating events, and one hundred (100) hazardous condition events.

Urologist Richard R. Augspurger, M.D., is Medical Director for The Urology Center of Colorado. Dr. Augspurger has practiced medicine for some 30 years. At respondents' request, Dr. Augspurger performed an independent medical examination of claimant on October 6, 2008. Urologists treat conditions associated with the urinary system and male fertility system, including treatment of prostate conditions. Dr. Augspurger testified as an expert in the area of Urology. Crediting Dr. Augspurger's testimony, prostate cancer is the most common cancer that men contract. Regarding etiology, Dr. Augspurger testified:

> In most cases, we don't know the reason why people get prostate cancer.
>
> ****
>
> Most cases, 85 percent of the cases of prostate cancer, we do not know the etiology. It happens sporadically. So, it can happen in every man.
>
> ****
>
> [A]lmost all the people who come to our office have sporadic prostate cancer. And then, there's a group of people which count for 15 percent, and that's the familial, the ones that run in families. So, the ones that go in

> families is about 15 percent. And then there's a little smaller group here, which are the hereditary ones.
>
> ****
>
> And hereditary means there's some genes associated with it, and there's at least seven genes, and probably more today, that have been identified as a link to prostate cancer.
>
> The problem you have is just because you have the gene for prostate cancer doesn't mean that prostate cancer will be manifested.

Dr. Augspurger placed claimant in the hereditary category because he has a father who has prostate cancer and because claimant and his brother developed prostate cancer under the age of 55 years.

Respondents retained Epidemiologist Noel S. Weiss, M.D., to review claimant's case and to testify as an expert in Epidemiology, which involves the investigation of risk. In his report, Dr. Weiss wrote:

> If we tentatively assume that firefighting can adversely influence the risk of prostate cancer, what is the likelihood that for a given firefighter who developed that cancer, his exposure on the job was a contributory factor**? Unfortunately, any man can develop cancer of the prostate, and almost always the reasons for its development are unknown. Whatever these reasons, they are present in firefighters just as in the rest of us.** So if a firefighter does develop prostate cancer it could be the result of on the job exposure (given the tentative assumption made above), or it could be due to the result of non-occupational exposure or exposures.

(Emphasis added).

The Judge credits the testimony of Dr. Weiss in finding: Meta-analysis is a structured quantitative review of the medical literature on a particular subject, providing a summary estimate of the association (observed higher incidence) between a particular exposure and a particular disease; a carcinogen is a substance that, under some circumstances, and in certain species, has the capacity to increase the risk of developing cancer.

One study, *Cancer Risk Among Firefighters: A Review and Meta-analysis of 32 Studies*, referred to as the LeMasters's study, suggests a probable association of increased risk of prostate cancer among firefighters, based upon studies demonstrating a 28% increased risk over the general population of men. The LeMasters's study provides:

> Results showing a probable association for prostate cancer is curious. Prostate cancer is the most common malignancy affecting men and is the second leading cause of cancer. **Risk of developing prostate cancer is associated with advancing age, black race, a positive family history**,

> and may be influenced by diet. **Although the positive association with prostate cancer may be due to some of these factors, it is unlikely that these entirely explain the findings**; most studies analyzed white men adjusting for age.

(Emphasis added).

According to Dr. Weiss, the LeMasters's study concluded that firefighters may have a 28% increased risk of developing prostate cancer. This equates to a relative risk of 1.28, meaning that if you consider 128 firefighters with prostate cancer (and no family history), 28 of those men may have contracted prostate cancer because of firefighting and the other 100 would have contracted prostate cancer even if they were never firefighters.

Dr. Weiss testified to the following: There have been a number of studies of prostate cancer that looked at family history as a potential risk factor. Those studies conclude that the increased risk associated with having a father and brother diagnosed with prostate cancer is quite strong. Compared to the 1.28 relative risk (or 28% increase) for firefighters and prostate cancer, if a man has a father and a brother who have a history of prostate cancer, the relative risk is 5, which translates into a 500% increased risk. When comparing a 28% increased risk for firefighters to develop prostate cancer to a 500% increased risk for hereditary factors, there's no question that the excess risk associated with family history, not only in terms of its size, but also in terms of the solidity of the interpretation, greatly differs for that of firefighters. In statistical terms, the 500% is, according to Dr. Weiss, far more than probable, it is more definite.

Virginia Weaver, M.D., testified as claimant's medical expert in the area of occupational medicine and public health. Dr. Weaver agreed that she is not an expert in epidemiology. Dr. Weaver has studied the connection between firefighting and occupational exposures to carcinogenic substances. Since 2006, Dr. Weaver has held the position of Director of the Johns Hopkins University, Bloomberg School of Public Health Occupational Medicine Environmental Medicine, Residency Program. As an expert in the field of public health and occupational disease, Dr. Weaver has worked closely with the International Association of Fire Fighters (IAFF). The IAFF funds a residency program at Johns Hopkins.

The testimony of Dr. Weaver and Dr. Weiss, as well as the scientific articles introduced by claimant, establish that combat firefighters are exposed to numerous carcinogens, such as, arsenic, asbestos, benzene, benzo[a]pyrene, formaldehyde, polychlorinated dibenzo-furans, dibenzo-*p*-dioxens. Firefighters are exposed to high levels of these carcinogens during both fire suppression and fire overhaul phases. According to Dr. Weiss, there are studies that show exposures to benzene, benzoprine, soot, formaldehyde, and diesel exhaust may cause an increased risk to some forms of cancer, but not prostate cancer.

According to Dr. Weiss, the data falls short of showing that firefighting predisposes a firefighter to any form of cancer. Dr. Weiss disagrees with the presumption enacted by

the General Assembly under §8-41-209; he argues the presumption is unsupported scientifically and should not be applied in any case. In essence, Dr. Weiss argues there is no adequately established causal relationship between firefighter's exposure to carcinogens and the development of cancer.

In summary, Dr. Weiss admitted that he did not know what caused claimant's prostate cancer. Although he asserted that claimant's cancer development was more likely genetic, he was unable to identify which of claimant's genes would have caused him to contract prostate cancer.

Dr. Weaver is an acknowledged advocate for firefighters. Dr. Weaver testified before a legislative committee of the Colorado General Assembly at the request of the IAFF and the Colorado Professional Firefighters. Dr. Weaver advocated in favor of passage of the statutory presumption now codified at §8-41-209. Dr. Weaver's testimony before the legislative committee was not specific to prostate cancer. Dr. Weaver instead testified that, in general, there is a causal relationship between firefighters's occupational exposures and all types of cancer.

According to Dr. Weaver, multiple studies show combat firefighters repeatedly face uncontrolled exposures to carcinogens. Dr. Weaver discussed the shortfalls in epidemiological research to determine the precise dosage of carcinogens combat firefighters encounter. Dr. Weaver wrote:

> Risk estimates … likely underestimate the true risk in fire fighters due to the challenges in accurately accessing risk in fire fighters. The first challenge is exposure assessment. In controlled manufacturing settings, air monitoring is performed to calculate routine exposures. This is impossible for fire fighters. As a result, many studies simply list exposure as yes or no based on occupation as a fire fighter. However, there is wide variation in exposures depending on geographic location of the fire station the employee works in and the duration of exposure.

Dr. Weaver also identified what she termed the "healthy worker effect" as a further limitation to the development of scientific models; she wrote:

> In order to perform the physically demanding work involved in fire fighting, workers must enter the workforce very fit and continue to exercise and watch their diet to control weight and maintain physical ability ….

Dr. Weaver explained that the LeMasters study shows that, overall, firefighters have a 10% lower risk of dying at a given age than the general population because of the healthy worker effect.

Dr. Weaver opined that claimant has two identified risk factors for cancer: Claimant's occupation as a combat firefighter, which comprises thirty years of exposure to carcino-

gens, and his family history. Dr. Weaver opined that, given the length of his work as a firefighter, claimant's occupational exposure clearly contributed to his prostate cancer and is not outweighed by his family history. Dr. Weaver testified that a recent study from the National Cancer Institute demonstrated that combat firefighting also carries with it a three to four-fold risk of prostate cancer, a risk not dissimilar to that based on hereditary factors.

Dr. Weaver explained: The synergy of the heredity factor coupled with exposure to carcinogens is not fully understood. While this is a consideration to be studied, the science is still lagging. This is why, from a public health prospective, the firefighter presumption has been adopted in Colorado and in many other states in recognition of the increased risk that combat firefighters daily encounter in their life-saving occupation.

Dr. Augspurger agrees that the LeMasters's study shows an increased incidence of prostate cancer in firefighters. According to Dr. Augspurger, claimant's strong family history remains the most likely risk factor for his prostate cancer, irrespective of his work as a firefighter. Dr. Augspurger however testified that he continues to hold to what he opined in his written report, where he wrote:

> It is not possible for me to determine which is the underlying etiology for [claimant's] prostate cancer.

Dr. Augspurger testified:

> **For each individual patient you cannot say** [heredity] is a specific factor. But **if you go on percentages, the most likely cause** on percentage basis **would be the family history**.

(Emphasis added). The Judge infers from his testimony that, while Dr. Augspurger might rely upon statistical data showing an association between risk of prostate cancer and a patient's family history, that association is only useful in advising a patient to undergo testing, and not for determining what is the medically probable cause of the cancer. Dr. Augspurger continues to opine that the cause or etiology of claimant's prostate cancer is beyond the reach of current medical science. Dr. Augspurger's medical opinion here was supported by the opinions of Dr. Weiss and Dr. Weaver. Dr. Augspurger's opinion was persuasive in showing it beyond the reach of current medical science to determine the medically probable cause of claimant's prostate cancer.

Respondents failed to show it more medically probable than not that claimant's prostate cancer was proximately caused by an exposure outside of his employment as a combat firefighter. Under §8-41-209, respondents shouldered the burden to adduce medical evidence showing it medically probable claimant's prostate cancer was proximately caused by a hazard or exposure outside of his employment as a combat firefighter. The Judge credited the medical opinion of Dr. Augspurger in finding it beyond the reach of current medical science to determine the medically probable cause of claimant's prostate cancer. Thus, while Dr. Weiss and Dr. Weaver interpret epidemiological studies differently in establishing whether or not there is some statistical significance or associa-

tion between claimant's occupational exposure from his work as a combat firefighter and the development of prostate cancer, such evidence is insufficient to show the medically probable cause of claimant's prostate cancer. The Judge thus largely rejects the opinions of Dr. Weiss and Dr. Weaver as lacking probative value on the question of the medically probable or proximate cause of claimant's prostate cancer.

Claimant showed it more probably true than not that his occupational disease of prostate cancer proximately caused his wage loss during the 4-month period following his surgery. Crediting his testimony, claimant was unable to return to his regular work at employer for a period of 4 months following his surgery.

Claimant showed it more probably true than not that medical treatment from May 12, 2008, ongoing, provided by Dr. Holthauser, by Dr. Lee, and by medical providers to whom they referred claimant was reasonable and necessary to cure and relieve claimant of the effects of his compensable prostate cancer condition.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

A. Compensability:

Respondents argue they have shown by a preponderance of the medical evidence that claimant's prostate cancer was proximately caused by a hazard or exposure outside of his employment as a combat firefighter. The Judge disagrees.

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2008), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. Claimant shoulders the burden of proving by a preponderance of the evidence that his prostate cancer arose out of the course and scope of his employment as a firefighter. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d

1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), *supra*, as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, **and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.**

(Emphasis added). This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).

Here, the Judge found that respondents failed to show it more medically probable than not that claimant's prostate cancer was proximately caused by an exposure outside of his employment as a combat firefighter. The Judge construed §8-41-209(2)(b), *supra*, as requiring respondents to adduce medical evidence showing it medically probable claimant's prostate cancer was proximately caused by a hazard or exposure outside of his employment as a combat firefighter. Respondents thus failed to prove by a preponderance of the medical evidence that claimant's prostate cancer was proximately caused by an exposure outside of his employment.

The Judge credited the medical opinion of Dr. Augspurger in finding it beyond the reach of current medical science to determine the medically probable cause of claimant's prostate cancer. While Dr. Weiss and Dr. Weaver interpret epidemiological studies differently in establishing whether or not there is some statistical significance or association between claimant's occupational exposure from his work as a combat firefighter and the development of prostate cancer, the Judge found such evidence insufficient to show the medically probable cause of claimant's prostate cancer. The Judge thus largely rejected the opinions of Dr. Weiss and Dr. Weaver as lacking probative value on the question of the medically probable or proximate cause of claimant's prostate cancer.

The Judge concludes claimant's development of prostate cancer should be found a compensable occupational disease.

B. Medial and Temporary Disability Benefits:

Claimant argues he has proven by a preponderance of the evidence that he is entitled to medical and temporary disability benefits. The Judge agrees.

Section 8-42-101(1)(a), supra, provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

Respondents thus are liable for authorized medical treatment reasonably necessary to cure and relieve the employee from the effects of the injury. Section 8-42-101, *supra*; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

The Judge found that claimant showed it more probably true than not that medical treatment from May 12, 2008, ongoing, provided by Dr. Holthauser, by Dr. Lee, and by medical providers to whom they referred claimant was reasonable and necessary to cure and relieve claimant of the effects of his compensable prostate cancer condition. The Judge further found that claimant showed it more probably true than not that his occupational disease of prostate cancer proximately caused his wage loss during the 4-month period following his surgery. The Judge credited his testimony in finding claimant was unable to return to his regular work at employer for a period of 4 months following his surgery.

The Judge concludes that insurer should pay, pursuant to fee schedule, for medical treatment from May 12, 2008, ongoing, provided by Dr. Holthauser, by Dr. Lee, and by medical providers to whom they referred claimant for reasonably necessary treatment of his compensable prostate cancer condition. Insurer should pay claimant TTD benefits from June 23, 2008, ongoing for a period of 4 months until claimant returned to his regular work.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's development of prostate cancer is a compensable occupational disease.

2. Insurer shall pay, pursuant to fee schedule, for medical treatment from May 12, 2008, ongoing, provided by Dr. Holthauser, by Dr. Lee, and by medical providers to whom they referred claimant for reasonably necessary treatment of his compensable prostate cancer condition.

3. Insurer shall pay claimant TTD benefits from June 23, 2008, ongoing for a period of 4 months until claimant returned to his regular work.

4. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

5. Issues not expressly decided herein are reserved to the parties for future determination.

DATED: May 20, 2009

Michael E. Harr,
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-767-542

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 14, 2009, in Denver, Colorado. The hearing was

digitally recorded (Reference: 5/14/09, Courtroom 4, beginning at 8:34 AM, and ending at 9:51 AM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel, to be submitted electronically, giving Respondent 3 working days after receipt thereof within which to file objections. The proposed decision was submitted on May 19, 2009. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified the proposed decision and, as modified, hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; if compensable, average weekly wage (AWW); temporary total disability (TTD) from June 23, 2008 through September 1, 2008, inclusive; bodily disfigurement; and, medical benefits (authorization, reasonably necessary and causal relatedness).

At the commencement of the hearing, the parties stipulated that Claimant's correct AWW is $660.12, thus, yielding a TTD rate of $442.00 per week, and the ALJ so finds.

Respondents raised the affirmative proposition of penalties for late reporting, as provided by Section 8-43-102(1)(a), C.R.S. (2008). Claimant bears the burden of proof by a preponderance of the evidence on all issues except penalties, for which Respondent bears the burden of proof.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant is employed at one of the Employer's stores as the assistant produce manager. Claimant's job duties include produce stocking, cleaning produce area and moving produce to and from the sales floor.

2. On May 25, 2008, the Claimant was working the closing shift. As part of his regular job duties, he was required to move four bins of watermelons from the front of the store to the produce floor.

3. While the Claimant was moving the bins of watermelon, he sustained an injury to his abdominal area. He felt nausea and fatigue and the next day, May 26, 2008, he found a small lump over his navel.

4. Claimant did not know the extent of his injury and, therefore, he did not immediately report the injury in writing to his Employer. Claimant also testified that he did not report the injury at first because the store had a streak of 650 days of no injuries. According to the Claimant, employees were rewarded with food and parties due to the stores injury free record. After the Claimant learned the extent of his injury and that he would need surgery and would miss a considerable amount of work he reported the injury.

5. Claimant continued to work full duty for the Employer and on June 10, 2008, he went to his personal care physician, Timothy Lewan, M.D., complaining of abdominal pain and a lump.

6. Dr. Lewan diagnosed the Claimant with a ventral hernia and he referred the Claimant for a surgical consultation.

7. On July 18, 2008, Allen Rosenberger, M.D., a surgeon, saw the Claimant for a surgical consultation. Dr. Rosenberger determined at that time that Claimant would need surgical repair for his injury.

8. Claimant reported the injury, in writing, to his Employer on July 21, 2008, and was he referred to workers' compensation physician, Julie Parsons, M.D., who became the Claimant's authorized treating physician (ATP).

9. On July 22, 2008, Dr. Parsons evaluated the Claimant. She was of the opinion that Claimant's objective findings were consistent with the mechanism of injury. Dr. Parsons diagnosed Claimant with a hernia and referred him to Dr. Rosenberger for surgery.

10. On July 23, 2008, the Claimant underwent surgical repair for his hernia, by Dr. Rosenberger.

11. As a result of Claimant's surgical repair, he has sustained substantial disfigurement. He has a 2" horizontal surgical scar over his navel.

12. After surgery, the Claimant was placed on restrictions and those restrictions prevented him from performing his regular job as an assistant produce manager with the Employer.

13. Claimant was off work from June 23, 2008 to September 2, 2008, due to his work related injury, restrictions and surgical repair. Respondent, however, offered Claimant light duty for four days between July 23, 2008 and September 2, 2008. Claimant earned full wages during these four days.

14. Claimant has proven that it is more probable than not that moving the watermelons on May 25, 2008 caused him to suffer a work related injury. Claimant has proven that his hernia arose out of the course and scope of his employment and was proximally caused by his job duties.

15. Claimant's testimony that he sustained a work related injury on May 25, 2008 was credible and persuasive.

16. Claimant has proven, by a preponderance of the evidence, that his hernia is causally related to the injury on May 25, 2008, and that the medical care and treatment for this condition was, and is, reasonably necessary to cure and relieve the effects of the injury, and that all medical care on and after July 21, 2008 was, and is, authorized.

17. Claimant's treatment with his primary care physician, Dr. Lewan, prior to reporting his work related injury, is not authorized and not the responsibility of Respondent.

18. Respondent's request for penalties under Section 8-43-102(1)(a), C.R.S. (2008), is moot because Claimant is not claiming wage loss until July 21, 2008.

19. Claimant is not requesting TTD benefits from May 25, 2008 to July 21, 2008, as he continued to work full duty during that period of time.

20. Claimant reported the work-related nature of his injury in writing on July 21, 2008, and he was taken off work from July 21, 2008 through September 2, 2008 as a result of his surgery. Therefore, the Claimant has proven, by preponderant evidence, that he was temporarily and totally disabled during that period of time, with the exception of four days when he earned full wages at modified duty. Claimant has failed to prove any temporary disability from September 3, 2008 through the hearing date of May 14, 2009.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions; the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). As found, the Claimant's testimony was credible and it supports the occurrence of a compensable hernia. The medical opinion on reasonable necessity of the need for surgery is un-contradicted. Indeed, Claimant's ATP, Dr. Parsons, referred the Claimant for a surgical consultation with Dr. Rosenberger, who performed a surgical repair of Claimant's hernia. *See, Annotation, Comment: Credibility of Witness Giving Uncontradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, Dr. Rosenberger's opinion is un-contradicted.

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Claimant has sustained his burden with respect to compensability, medical benefits (authorization, reasonably necessary and causally related), AWW, and TTD. Although Respondent has sustained its burden with respect to late reporting of injury, the issue is moot since Claimant is not claiming any temporary disability benefits before reporting the work-related nature of his injury to his Employer.

c. An injury is deemed compensable when a claimant proves that there was a causal connection between the work and the injury. *See Toldebert v. Martin Marietta Corp.,* 759 P.2d 17 (1988). Where, at the time of the accident, the employee is performing a service arising out of and in the course of his employment, and where the injury is

proximally caused by the accident arising out of and in the course of his employment, and is not intentionally self-inflicted, compensation is warranted. *J.W. Metz Lumbar Co. v. Taylor,* 302 P.2d 521, 134 Colo. 249 (1956). As found, Claimant has proven that his hernia arose out of the course and scope of his employment and was proximally caused by his job duties.

d. The employer's initial right to select the treating physician is triggered once the employer has some knowledge of the facts concerning the injury or occupational disease related to the employment and indicating "**to a reasonably conscientious manager**" that a **potential** workers' compensation claim may be involved. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). As found, Claimant reported the work-related nature of his injury to the Employer on July 21, 2008, and the Employer referred him to Dr. Parsons, who in turn referred him to Dr. Rosenberger for surgery. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Industrial Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, Dr. Parsons referred the Claimant to Dr. Rosenberger for surgery, and this was in the natural progression of medical treatment.

e. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to his compensable hernia of May 25, 2008. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. Section 8-42-101 (1) (a), C.R.S. (2008). *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, all of the Claimant's medical care and treatment for the hernia, as reflected in the evidence, was and is reasonably necessary.

f. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S. (2008); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to work at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973, (ICAO, December 18, 2000). As found, Claimant was unable to perform his job from July 21, 2008 through September 2, 2008, both dates inclusive, excluding the four days Claimant actually worked at full wages, a total of 39 days. As found, Claimant has failed to prove any temporary disability from September 3, 2008 through the hearing date of May 14, 2009.

g. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, Claimant sustained a 100% temporary wage loss from July 21, 2008 through September 2, 2008, with the exception of four days working during this period of time.

e. Temporary total disability benefits are paid at a rate of two thirds of the AWW, not to exceed a maximum of 91% of the state AWW. Section 8-42-105(1), C.R.S. (2008). Based on the AWW of $660.12, which yields a TTD rate of $442.00 per week, or $63.14 per day, Claimant is entitled to aggregate TTD benefits of $2,462.46 for the period from July 21, 2008 through September 2, 2008, excluding the four days worked during this period of time.

ORDER

IT IS THEREFORE ORDERED THAT:

A. Respondent shall pay the costs of all medical care and treatment for his compensable hernia, after July 21, 2008, including the costs of surgery, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Respondent shall pay the Claimant temporary total disability benefits at the rate of $443.00 per week, or $63.14 per day, from July 21, 2008 through September 2, 2008, both dates inclusive, excluding the four days worked at full wages, a total of 39 days, in the aggregate amount of $2,462.46, which is payable retroactively and forthwith. Any and all claims for temporary disability benefits from September 3, 2008 though May 14, 2009 are hereby denied and dismissed.

C. Respondent shall pay the Claimant the sum of $600.00 for and on account of bodily disfigurement, in addition to all other benefits due, which is payable in one lump sum.

D. Respondent's request for late reporting penalties, pursuant to Section 8-43-102 (1) (a), C.R.S. (2008), although proven, is hereby denied and dismissed as moot since there are no claims for temporary benefits before the reporting date.

E. Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

F. Any and all issues not determined herein are reserved for future decision.

DATED this _____ day of May 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-723-662, 4-703-202 and **4-665-972**

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 2, 2009 and April 27, 2009, in Denver, Colorado. The three cases below were consolidated for all purposes, and are referenced by **W.C. No. 4-723-**662. The hearing was digitally recorded (reference: 2/2/09, Courtroom 4, beginning at 1:30 PM, and ending at 4:52 PM; and, 4/27/09, Courtroom 3, beginning at 1:30 PM, and ending at 3:30 PM).

W.C. No. **4-723-662**, a fully contested alleged injury of July 5, 2003, at which time the Employer was insured by Wausau Insurance Company (hereinafter "Wausau"), was dismissed by Full Findings of fact, Conclusions of Law and Order, mailed May 5, 2009. W.C. No. **4-703-202**, a fully contested injury of December 16, 1998, concerning Lumbermen"s Underwriting Alliance (hereinafter "Lumbermen's") was dismissed by Full Findings, mailed May 5, 2009.

The subject of this decision involves W.C. No. 4-665-972, a fully contested alleged injury of May 2005, at which time the Employer was insured by Employers Compensation Insurance Company (hereinafter ("Employers Insurance"). The work-related nature of the injury was first reported to the Employer on October 14, 2005.

At the conclusion of the hearing, with respect to W.C. No. 4-665-972 (the alleged injury of October 15, 2005), the ALJ established a briefing schedule: Claimant's opening brief to be filed electronically within 5 working days, or by May 4, 2009; Respondents' answer brief to be filed within 5 working days thereof, or by May 11, 2009; and, Claimant's reply brief to be filed within 3 working days, or by May 14, 2009. Claimant's opening brief was filed on May 4, 2009. Respondents' answer brief was filed on May 11, 2009. No timely reply brief was filed. The matter was deemed submitted for decision on May 15, 2009.

ISSUES

The issues to be determined by this decision concern: (1) whether the Claimant sustained a compensable traumatic injury in May 2005, while lifting a window well, with an onset of disability on or about October 14, 2005, specifically, did the Claimant sustain a compensable aggravation of a preexisting back condition in May 2005, or did he experience a non-compensable exacerbation in the natural progression of his preexisting back condition; if compensable, (2) whether Claimant is entitled to medical benefits (authorization, causally related and reasonably necessary); average weekly wage (AWW); and, temporary total disability (TTD) benefits from January 19, 2006 and continuing until termination thereof is warranted by law. Respondents raised the affirmative defense of "responsibility for termination."

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant is a 54-year old former employee of the Employer herein. The Employer first employed the Claimant in 1993 as a concrete construction laborer. Not long after the commencement of his employment, the Employer promoted the Claimant to the position of construction foreman.

Previous Injuries

2. On May 30, 1995, the Claimant sustained an injury to his hand and fingertips. He reported the May 30, 1995 injury to his Employer and he received treatment, and returned to work following the May 30, 1995 injury.

3. On July 31, 1998, Ralph Hart, M.D., evaluated the Claimant. Claimant reported to Dr. Hart a "history of low back pain."

4. On December 16, 1998 (W.C. No. 4-703-202), Claimant was working near a concrete foundation that had been constructed as the basement of a residence. He caught his pant leg on a piece of jutting rebar, lost his balance and fell some eight feet into the foundation, landing feet first. Claimant reported the accident and was seen that same day by Joseph Anderson, M.D. Dr. Anderson noted that the Claimant had fell from 8 feet, landing on both feet, and injuring his right foot, heel and ankle. Claimant was diagnosed as suffering a "severe" right heel contusion in the fall. Dr. Anderson took X-rays of the right foot and ankle, prescribed an Ace bandage, use of crutches and a few days rest. As of April 27, 2006, Sander Orent, M.D., an Independent Medical Examiner (IME), engaged by Respondents, expressed the opinion that this incident was the initial cause of a compression fracture in the Claimant's low back. Claimant testified that he did not miss time from work because of this injury. This testimony enhances his credibility because it is not helpful to the Claimant in terms of tolling the statute of limita-

tions. This claim was dismissed, based on the statute of limitations.

5. Although no additional treatment was authorized or deemed necessary at the time of the 1998 accident, Claimant saw Sheryl Ehrman, R. N., on January 16, 1999, at Johnstown Family Physicians, the office of his primary care physicians. Nurse Ehrman noted that the Claimant was concerned about continued pain in his right foot and a perceived loss of strength in his right hand. The nurse questioned whether the Claimant may have suffered a possible cervical injury "based upon the mechanism of his fall". Nurse Ehrman recommended that Claimant follow up with workers' compensation for further evaluation and a possible cervical MRI (magnetic resonance imaging). Claimant did not pursue additional treatment nor a workers' compensation claim at the time. Again, the Claimant's actions, or inactions, in this regard enhance his credibility.

6. On April 30, 2001, Claimant reported an alleged left shoulder strain to Judy Cruz in Human Resources. Claimant reported the alleged shoulder injury occurred on April 27, 2001. The Claimant did not further pursue the matter.

7. Claimant sustained a lumbar strain on Saturday, July 5, 2003 (W.C. No. 4-723-662), while attaching a trailer loaded with concrete forms to a work truck. Although equipped with a jack, the effort needed for the Claimant to secure the trailer to the rear of the truck caused him to strain his lower back. John W. Volk, M.D., a physician at Johnstown Family Physicians, saw the Claimant on July 7, 2003. Dr. Volk noted that the Claimant was tender along the lumbosacral spine and diagnosed a lumbar strain. Dr. Volk prescribed Ibuprofen 800 mg. and home exercises. Claimant did not pursue additional treatment nor a workers' compensation claim, at that time, nor did he miss three days or more from work, according to his testimony. This enhances his credibility because it is not helpful to a tolling of the statute of limitations. This claim was dismissed, based on the statute of limitations.

8. Claimant did not seek any additional treatment or evaluation for his low back until July 27, 2004. He was seen, once again, at Johnstown Family Physicians, this time by Thomas A. Kenigsberg, M.D. Dr. Kenigsberg noted that Claimant had been suffering from back pain for approximately one year; which would be consistent with the injury of July 5, 2003. Dr. Kenigsberg assessed "chronic back pain" and ordered an MRI (magnetic resonance imaging) because the Claimant had not improved over the past year and the physician wanted to evaluate him for nerve impingement.

9. Eric W. Roberts, M.D., performed an MRI exam of the lumbar spine at the North Colorado Medical Center on August 4, 2004. The exam revealed significant degenerative changes in the Claimant's back. Relevant findings included the following:

- Mild circumferential canal stenosis at the L1-2 level. Borderline anteroposterior canal stenosis at T12-L1.
- Disk protrusions at T11-12, T12-L1, L1-2, and L5-SI.
- Diffuse bulging at the L3-4 and L4-5 disks.
- Mild right-sided neural foraminal stenosis at L4-5. A left lateral component of the disk-osteophyte complex at L2-3 impinges on the left L2 root peripheral to the neural foramen.

- Mild aligment changes at T12-L1 and L1-2, as described.
- Multilevel degenerative spondylosis. Posterior and marginal osteophytes contribute to the epidural defects at L1-2 and L2-3.
- Mild wedge compression at L1 that appears old.
- Bulbous facets at several levels with mild hypertrophic degenerative changes at some levels.

10. Claimant's primary care physicians referred him for physical therapy. He was evaluated at North Colorado Medical Center Rehabilitation Services on August 13, 2004, by Eric E. Sawyer, M.S., Physical Therapist (PT). Claimant attended 3 sessions of physical therapy from August 13, 2004 through September 7, 2004 and was discharged from therapy. Sawyer noted improvement in the Claimant's symptoms and that Claimant had reached the point at discharge where he could pursue his back stabilization program independently. The Claimant is a poor historian and does not have a great facility with dates. Overall, however, his testimony about his injuries and progress since 1998 is consistent, un-contradicted and credible.

Compensability of the 2005 Injury

11. The Claimant's condition remained stable after physical therapy and until sometime in early May of 2005. In May 2005, the Claimant strained his low back once again when lifting a metal window well that had become stuck in the frozen soil at the Employer's shop. He did not appreciate the seriousness and potentially compensable nature of the incident until October 13, 2005, when Scott Dhupar, M.D., informed him that he would need back surgery. Although treating with Michael Hajek, M.D., an orthopedic physician, for his left shoulder and left knee, he did not mention his back to Dr. Hajek until September 15, 2005. He saw Dr. Hajek on April 21, 2005, May 19, 2005 and May 31, 2005. He stated that he did not mention his symptoms to Dr. Hajek because he felt that his low back symptoms would resolve as they had in the past. Respondents argue that Claimant was familiar with workers' compensation claims, based on his history, thus, the late reporting of the May 2005 "window well lifting" incident" makes the Claimant's allegations lacking in credibility. The ALJ finds the Claimant's explanation of the reporting of the incident approximately five months later to be a plausible one for a construction worker in light of the Claimant's belief that his back would get better. The totality of the medical evidence reveals that the Claimant's belief that his back would get better was contrary to medical reality.

12. During his hearing testimony, the ALJ observed that the Claimant is inarticulate, not good with dates and overall a poor historian. This explains, in part, the fact that he did not specifically report the "window well lifting" incident of May 2005 until October 2005 when surgery was imminent.

13. Lynn testified that in the summer of 2005 the Claimant expressed concern he may have cancer in his back. Claimant did not mention a work related incident precipitating his back pain. This communication to Lynn is consistent with Claimant having sustained an aggravation and acceleration of his underlying degenerative back condition in the May 2005 "window well lifting" incident.

14. Respondents argue that it is “counterintuitive” that Claimant failed to report the Spring 2005 accident to his Employer because the Claimant knew the procedures for reporting injuries and had reported prior workers’ compensation injuries after they occurred. The ALJ does not find this argument persuasive. Moreover, there is substantial evidence that the Claimant’s explanation for not reporting the “window well lifting” incident of May 2005 until October 2005 is a plausible – he thought his back would get better. Such behavior is consistent with an individual suffering from a degenerative back condition to the extent to which the Claimant was subject.

15. On August 19, 2005, Claimant again sought treatment with Dr. Volk. Claimant reported to Dr. Volk he had been experiencing “low back pain for a week now.” Dr. Volk noted that Claimant had “no recall of any specific injury,” and he diagnosed a lumbar strain.

16. On September 15, 2005, Dr. Hajek again evaluated the Claimant for low back pain. Again, Claimant did not report the alleged “window well lifting” incident of May 2005 to Dr. Hajek. Dr. Hajek was of the opinion that the Claimant suffered left sciatica with degenerartive lumbar disease. He noted “there is a question of significant disease at L5-S1 on MRI scan.”

17. Willis Chung, M.D., performed a second lumbar MRI at the Greeley X-Ray Group, P.C. on September 21, 2005. Dr. Chung's most significant impression was,

> Prominent spinal stenosis at L1 produced by a moderate diffuse disc bulge and prominent left lateral disc herniation. The free fragment extends inferiorly from the disc space to reach the mid L2 level. It compresses the left L2 nerve root in the lateral recess.

The ALJ infers and finds that the aggregate circumstantial evidence supports the proposition that the free fragment and aggravation of Claimant’s disc herniation was caused by the “window well lifting” incident.

18. Claimant first appreciated the causal relationship between the “window well lifting” incident of May 2005, and the significant and potentially compensable nature of the incident on October 13, 2005, when Scott Dhupar, M.D., a referral from Dr. Hajek, informed the Claimant that he would require back surgery. The next day, on October 14, 2005, the Claimant notified his Employer that he needed surgery and that it was work related. He reported that he had injured himself lifting window wells. He did not identify a date of injury at the time. The Employer filed a First Report of Injury on the same date. The Employer referred the Claimant to Craig Anderson, M.D., at HealthONE Occupational Medicine and Rehabilitation. Dr. Anderson became the Claimant’s authorized treating physician (ATP) at that time. Dr. Anderson saw the Claimant on October 17, 2005 and noted that the Claimant had been suffering with back pain for some time. Claimant reported that he had been suffering back pain for the previous 1 ½ to two months. The ALJ infers and finds that this is consistent with Claimant’s August 19, 2005 report to Dr. Volk that he had been experiencing back pain for a week. It is also consistent with Claimant’s testimony that he felt he would get better after the May 2005 “window well lifting” incident, which had occurred in May 2005. Dr. Anderson noted that the Claimant "had increased back pain with lifting a window at some point." Claimant reported to Dr. Anderson that the onset of his back pain was gradual and he did not

know exactly when it started. Subsequently, Claimant traced it to the May 2005 "window well lifting" incident. Although, there is a seeming timing anomaly between Claimant's August report to Dr. Volk and his statement to Dr. Anderson that he had been suffering from back pain for 1½ months, the Claimant's recall of the May 2005 "window well lifting" incident is not inconsistent with the Claimant's overall history of "gradual onset." Notwithstanding being advised that the Claimant may have injured himself upon lifting a "window well," Dr. Anderson determined that the injury was not work related. Respondents' filed a Notice of Contest on October 25, 2006. There is no persuasive evidence concerning precisely when the Employer or insurance carrier became aware of Dr. Anderson's opinion that the Claimant's back condition was not work related. Presumably, Respondents filed the Notice of Contest, based on Dr. Anderson's opinion. Claimant's surgery occurred the day after the filing of the Notice of Contest. There is no persuasive evidence concerning whether or not the Employer or insurance carrier had a "reasonable time" to designate a surgeon for Claimant's allegedly "non-work" related back condition. In light of the "Notice of Contest," the ALJ infers and finds that a request for the carrier to pay for non-work related back surgery would be a futile act.

19. On October 21, 2005, the Employer offered Claimant modified duty of "work, full days supervising crews only. No lifting, bending or squatting at any time." Claimant did this work until he was terminated on January 19, 2006.

20. Respondents argue that both Dr. Anderson and Sander Orent, M.D. [Respondents' Independent Medical Examiner (IME)], testified they could not render an opinion that Claimant's current back condition was caused by, or aggravated by, his work the Employer. Dr. Orent noted the Claimant had chronic low back pain "with what appear[s] to be non work-related events (Dr. Orent did not persuasively elaborate on what **non-work** related factors precipitated Claimant's back pain). Dr. Orent stated that non-work related factors have precipitated this pain on occasion.

21. According to J. Stephen Gray, M.D, the Claimant's IME, "Dr. Anderson has not followed up with [Claimant]. It is apparent that Dr. Anderson made his causation opinion without the benefit of a review of medical records." Nevertheless, Dr. Anderson prescribed physical restrictions for the Claimant. There is no persuasive evidence, either way, that Dr. Anderson would have continued to treat the Claimant's alleged "non-work related" condition, or that Dr. Anderson would have referred the Claimant for surgery. Based on Dr. Anderson's opinion that Claimant's condition was not work-related, plus the fact that Dr. Anderson did not follow up with the Claimant, the ALJ infers and finds that it is unlikely that Dr. Anderson would begin, or continue, treating Claimant's back condition and bill the workers' compensation insurance carrier therefore; or, that Dr. Anderson would refer the Claimant for surgery under the auspices of the workers' compensation claim. This amounts to a "refusal to treat for non-medical reasons." There is no persuasive evidence, either way, concerning whether the insurance carrier had a "reasonable period of time" to designate a substitute physician and surgeon, or to assure Dr. Anderson that he would be paid under Claimant's workers' compensation claim; and, if so, whether the carrier would, in fact, pay for Claimant's continued back treatment and surgery despite the fact that it was contesting the compensability of Claimant's claim.

22. Scott Dhupar, M.D., an orthopedic surgeon, first saw the Claimant on October 13, 2005, on referral from a previous physician, Dr. Hajek, who had treated the Claimant prior to the present claim. Dr. Dhupar noted specifically that the Claimant was a construction foreman who six months prior had been "lifting a heavy object and sustained immediate pain in his lower back with pain radiating down his left lower extremity." The history given to Dr. Dhupar is consistent with the May 2005 “window well lifting” incident. Dr. Dhupar reviewed the recent MRI, noted the "very large left-sided L1-2 disc herniation," and recommended surgery.

23. Dr. Dhupar performed a hemilaminectomy at the L1 with a microdiscectomy at L1-L2 on October 26, 2005 at the Mountain Vista Surgery Center. The disc fragment was identified and removed during the course of the surgery. Claimant was discharged in stable condition on the same day as the surgery.

24. Dr. Gray, the Claimant’s IME, saw the Claimant on March 16, 2006. Dr. Gray reviewed all of the relevant medical records including those of the Claimant's primary care physicians. Dr. Gray ultimately determined that the Claimant suffered an aggravation of pre-existing L1-L2 disc disease, with progression to a herniated disc upon the work related lifting incident in the May 2005. He noted that,

> In retrospect, [Claimant] would be appropriately considered to have had a cumulative trauma disorder of his low back, up until the spring 2005 lifting incident, when his condition was traumatically worsened.

For the reasons articulated thus far, the ALJ finds Dr. Gray’s opinion on causation more persuasive and credible than the opinions of Dr. Anderson and Dr. Orent, Respondents IME.

25. Dr Orent saw the Claimant in an IME requested by Employers Insurance on April 27, 2006. Although Dr. Orent did not find the May 2005 lumbar injury and need for surgery work related, he commented in the "Impression" section of his report as follows:

> In addition, there is evidence of preexisting pathology in the lumbar spine including a compression fracture and symptoms in the low back as far back as 1998. . The disc herniation, in my opinion, is the progression of multi-level degenerative spine disease, which occurs at many levels and, in my opinion, is the progression of a probable initial disc injury done at the time of the compression fracture.

26. Dr. Orent was of the opinion that compression factures “are almost always caused by substantial vertical force; usually a fall where people land on their feet from a height or something compression the axial spine from above.” Dr. Orent, however, did not persuasively address whether a compression fracture or degenerative back condition could be aggravated and accelerated by lifting a window well that was stuck in snow. Dr. Orent stated, “the lack of specificity regarding the patient’s reporting and the variety of different incidents reported at different times renders the entire process confusing but simply the fact that this patient worked in heavy construction is inadequate to develop a causal relationship between his degenerative back…problems, and any putative occupational exposures.” The ALJ finds that Dr. Orent has essentially rendered a

non-opinion on causality, in this regard, based on a "confusing history" and the fact that Claimant worked in heavy construction. The ALJ finds Dr. Gray's opinion more persuasive and that opinion supports a compensable aggravation and acceleration of Claimant's degenerative back condition because of the "window well lifting" incident of May 2005.

27. The ALJ infers and finds that Dr. Orent's opinion on "natural progression" is undercut by the totality of the evidence concerning the significant deterioration of Claimant's back condition four or five months after the May 2005 window well lifting incident. Dr. Orent did **not** persuasively explain why the "window well lifting" incident was "a blip in the road" of "natural progression," as opposed to an aggravation and acceleration of the Claimant's underlying degenerative back disease. To accept Dr. Orent's opinion on "natural progression," the ALJ would be required to find that the Claimant's back made a quantum leap downward after May 2005 and before October 2005, which included a floating fragment from Claimant's disc herniation. The ALJ finds that this would involve more imagination than accepting Dr. Gray's opinion on causation. Consequently, the ALJ finds the opinion of Dr. Gray on causality, referenced in paragraph 13 above, more persuasive and credible than Dr. Orent's opinion.

28. Claimant worked for many years as a concrete construction worker with the Employer. He suffered a work related injury on December 16, 1998. Although initially determined to be only an injury of the right foot and ankle it is now evident that he probably suffered a compression fracture of the L1 vertebrae in the fall. In fact, the Respondents' expert medical witness, Dr. Orent, suggested in his April 27, 2006 IME report and in his June 7, 2006 deposition that this was the incident wherein the Claimant was originally injured. Although the 1998 injury was the first traceable cause of the Claimant's deteriorating back condition, the window well lifting incident of May 2005 significantly aggravated his underlying degenerative back condition.

29. The Claimant sustained a temporary exacerbation of the December 16, 1998 injury on July 5, 2003 when attaching a trailer to his work truck. The physical therapy provided him thereafter alleviated his symptoms but did not resolve the underlying problem. The MRI exam of August 4, 2004 established that the Claimant had sustained a prior compression fracture of the L1 vertebrae. The 2004 MRI, however, also established that the condition of his lumbar spine did not warrant any medical intervention beyond that of physical therapy at the time.

30. It was not until the work related lifting incident, a traumatic event, in May 2005, that the Claimant's back condition became worse to the point of warranting more substantial intervention. Again, Claimant believed that his symptoms would improve as they had in the past. By September 2005, however, his symptoms had worsened to the point that he advised Dr. Hajek of his worsening back. He did not mention the window well lifting incident to Dr. Hajek. The September 21, 2005 MRI disclosed significant pathology. The disc at the L1-L2 level was not only herniated but a free fragment from that disc was causing left sided nerve impingement. Surgical intervention was recommended.

31. Notwithstanding differences among the various doctors concerning the description of the incident, Claimant described a work related lifting incident in May

2005 to Dr. Anderson and to Dr. Dhupar (on October 13, 2005). He told Dr. Dhupar that he injured his back "approximately six months ago" when lifting a "heavy object" and experienced "immediate pain in his lower back with pain radiating down his left lower extremity." He told Dr. Anderson on October 17, 2005, that he "had increased back pain when lifting a window at some point." He reportedly told Dr. Orent, during the course of his examination on April 27, 2006, "that there was an incident when he was lifting a 4x8 piece of wood and he felt a pop in his back, which is what initiated the pain." He specifically told Dr. Gray on March 16, 2006, that,

> In late spring of 2005, [Claimant] was lifting a heavy window well that was stuck in ice. He states that he had to pull very forcefully to get the window well unstuck and then had to lift it. While doing so, he felt a pulling sensation in his low back, followed immediately by severe low back pain, with radiation of pain into his left leg.

32. Based on the totality of the evidence, the ALJ finds Dr. Gray's medical opinion on causation more persuasive and credible than the opinions of the ATP, Dr. Anderson, and the Respondents' IME, Dr. Orent.

33. The Employers' First Report of Injury, completed on October 14, 2005, indicates that Troy Lynn, the owner and president of the Employer, was notified on that day by the Claimant that Claimant had strained his lower back "lifting window wells," and that the Claimant needed surgery.

Medical Benefits

34. The lifting incident in May 2005 ultimately caused the need for surgical intervention. The September 21, 2005 MRI disclosed significant injury and pathology.

35. Dr. Anderson made a determination on October 17, 2005, without persuasive explanation, that the injury was not work related. Dr. Anderson did not follow up with the Claimant. He prescribed physical restrictions. Because Dr. Anderson was the workers' compensation ATP, the ALJ infers and finds that it is unlikely that Dr. Anderson would have continued to treat the Claimant in the workers' compensation context, or that he would have referred the Claimant for surgery under Claimant's workers' compensation claim. There was no persuasive evidence, however, concerning when the Employer and insurance carrier first knew of Dr. Anderson's October 17, 2005 opinion on lack of causality. The carrier knew by October 25, 2005, when it filed a Notice of Contest. Nevertheless, there was no persuasive evidence concerning whether or not the Employer or carrier had a "reasonable time" to designate a surgeon to perform allegedly "non-work related" surgery on the Claimant's back. The ALJ, however, infers and finds that it would be a futile act for the Claimant to request the Employer or workers' compensation insurance carrier to pay for back surgery in a fully contested claim. Dr. Anderson's opinion and actions amount to a refusal to further treat the Claimant's back condition for "non-medical reasons." When the Claimant advised his Employer, Troy Lynn, on October 14, 2005, that he needed surgery, the Employer referred the Claimant to Dr. Anderson, who determined that Claimant's back condition was not work-related and thereafter did not follow up with the Claimant. Claimant had previously selected Dr. Dhupar, outside of the context of this claim, as one of his treating physicians.

The ALJ finds that more specific evidence is required to determine whether the insurance carrier would have paid for Claimant's surgery at the hands of a surgeon of its choice, despite the fact that it was fully contesting the claim; and, whether the Employer and carrier had a "reasonable time" to do so. Ultimately, Dr. Dhupar performed surgery on the Claimant's back on October 26, 2005, one day after the Notice of Contest.

Average Weekly Wage

36. The Employer's First Report of Injury, dated October 14, 2005, recites an hourly pay rate of $21.50 an hour. Claimant testified, and it is undisputed, that he worked 40 hours per week for the Employer in 2005, and he was paid $21.50 an hour. Therefore, the ALJ finds that Claimant's AWW in May 2005 was $860. This yields a TTD rate of $573.33 per week, or $81.90 per day, which is less than the statutory cap of $674.59 per week for FY 04/05.

Temporary Total Disability/Responsibility for Termination

37. According to Troy Lynn, the owner of the company, the Claimant was being considered for a supervisory position with the company; notwithstanding his injury and need for surgery. The Claimant returned to modified duties in the middle of November 2005 and was terminated, with his entire crew, on January 19, 2006, ostensibly for insubordination. According to Lynn, the Claimant's crew did not have a good attitude and they did not treat the Employer's office staff appropriately. Lynn indicated that he felt it was better to terminate the Claimant and his entire crew to solve a morale problem. Subsequently, Lynn re-hired some members of Claimant's former crew. There is no persuasive evidence to suggest that the Claimant performed a volitional act or exercised such a degree of control over the circumstances that resulted in his termination to render him at fault. On the contrary, Lynn determined that the Claimant and his crew presented a morale problem and he terminated the Claimant and his entire crew, which was his right. This was a matter of choice for Lynn. The totality of the circumstances, however, do not support a termination for cause; especially when it is considered that two months prior to his termination the Claimant was being considered for a supervisory position with the company, and some of Claimant's former crew members were re-hired.

38. Although the onset of the Claimant's disability from the traumatic injury of May 2005 was October 14, 2005, when the Employer was notified that the Claimant needed surgery, Claimant is claiming TTD from January 19, 2006 and continuing. Claimant remained on modified employment until his termination on January 19, 2006. As of January 19, 2006, by terminating the Claimant, the Employer removed Claimant's ability to earn wages at modified employment. Claimant has continued to be unable to return to unrestricted duty, has not worked or earned wages, has not been declared to be a maximum medical improvement (MMI), and he remains temporarily and totally disabled.

39. Claimant's temporary disability is due the surgery and the restrictions that continue to limit his work capacity. Indeed, Dr. Orent, in his February 28, 2008 IME re-

port, states that he does not see Claimant ever returning to the type of heavy work he was doing with the Employer.

Ultimate Findings

40. The ALJ finds that the Claimant has proven that it is more reasonably probable that the May 2005 window well lifting incident significantly aggravated and accelerated his underlying degenerative back condition to the point that Claimant required surgery by Dr. Dhupar on October 26, 2005. Therefore, the Claimant has proven by a preponderance of the evidence that he sustained a compensable aggravation of his underlying, degenerative low back disease in May 2005, while working for the Employer. More evidence is required to specifically determine whether the Employer and/or insurance carrier would have paid for the Claimant's back surgery at the hands of a physician of their choice, despite the fact that the claim was being fully contested; and, whether the Respondents had a reasonable time to choose a substitute surgeon. Dr. Dhupar performed surgery on October 26, 2005. Claimant has proven by preponderant evidence that all of his medical care and treatment for his back after October 17, 2005 was causally related to the compensable injury of May 2005; and, was reasonably necessary to cure and relieve the effects of the compensable aggravation of Claimant's back; that his AWW is $860.00; and, that he has been TTD since January 19, 2006 and continuing.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility/Substantial Evidence

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, Claimant's recounting of his inju-

ries and progress since 1998 is plausible and credible. As further found, the opinion of IME Dr. Gray, concerning causal relatedness of the May 2005 "window well lifting" incident to Claimant's aggravation of his underlying degenerative back condition is more credible than the opinions of ATP Dr. Anderson and IME Dr. Orent. Also, as found, Respondents argue that it is "counterintuitive" that Claimant failed to report the Spring 2005 accident to his Employer because the Claimant knew the procedures for reporting injuries and had reported prior workers' compensation injuries after they occurred. The ALJ does not find this argument persuasive. Moreover, the Claimant offered a plausible explanation for not reporting the May 2005 "window well lifting" incident until surgery was imminent in October 2005 – he thought his back would get better. Such behavior is consistent with an individual suffering from a degenerative back condition to the extent to which the Claimant was subject.

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Brownson-Rausin v. Industrial Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). As found, Claimant offered a plausible explanation for not reporting the "window well lifting" incident of May 2005 until October 2005, and this explanation amounts to substantial evidence.

Compensability and Burden of Proof

c. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. (2008). The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. Section 8-41-301(1)(c), C.R.S. (2008). *See Merriman v. Industrial Commission,* 120 Colo. 400, 210 P.2d 448 (1949); *National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). *Also see* Section 8-41-301(1)(c), C.R.S. (2008); *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Industrial Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant sustained a compensable aggravation and acceleration of his underlying degenerative low back condition in May 2005, while lifting a window well for the Employer.

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to

benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Claimant has sustained his burden on compensability; medical benefits (excluding the authorization of Dr. Dhupar, which issue is reserved); AWW; and, TTD from January 19, 2006. Respondents have failed to sustain their burden with respect to "responsibility for termination."

Medical Benefits

e. Respondents are liable for authorized medical treatment that is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. (2008); *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). Section 8-43-404(5)(a), C.R.S. (2008), grants employers the initial authority to select the ATP. If an employer, however, is notified of an industrial injury and fails to designate an ATP the right of selection passes to the employee. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565, 567 (Colo. App. 1987). An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381, 383 (Colo. App. 2006). As found, the Employer referred the Claimant to Dr. Anderson on October 14, 2005, when Claimant reported the work-related nature of his condition and his need for surgery. Three days later, on October 17, 2005, Dr. Anderson summarily determined that Claimant's back condition was **not** work-related. Respondents filed a Notice of Contest on October 25, 2005. Dr. Dhupar performed back surgery on October 26, 2005.

f. If the physician selected refuses to treat for non-medical reasons, and the insurer fails to appoint a willing ATP **after notice of the refusal to treat**, the right of selection passes to the injured worker. *Weinmeister v. Cobe Cardiovascular, Inc.,* W.C. No. 4-657-812 [Industrial Claim Appeals Office (ICAO), July 10, 2006]. *Also see Lutz v. Industrial Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Ruybal v. University Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988). Also, if an ATP refuses to treat for non-medical reasons, the carrier is entitled to a reasonable period of time to select a replacement physician and tender the services of a substitute physician. This prerogative does not arise until the carrier becomes aware that the ATP is refusing to treat for "non-medical" reasons. *See Bilyeu v. Babcock & Wilcox, Inc.,* W.C. No. 4-349-701 (ICAO, July 24, 2001); *Rogan v. United Parcel,* W.C. 4-264-157 (ICAO, June 12,

2002). Nevertheless, as found, it would likely have been a futile act for Claimant to have asked the Respondents to designate a surgeon of their choice in light of the fact that Respondents were fully contesting Claimant's claim. The law does not require futile acts. *See Danielson v. Zoning Board of Adjustment,* 807 P.2d 541 (Colo. 1990). As found, the lifting incident of May 2005 caused the need for surgical intervention. When Claimant reported his need for surgery to his Employer on October 14, 2005, his Employer referred him to Dr. Anderson, who determined on October 17, 2005 that Claimant's back condition was not work related. The September 21, 2005 MRI disclosed significant injury and pathology. Dr. Anderson made a summary determination on October 17, 2005 that the injury was not work related.

Average Weekly Wage

g. Ordinarily, AWW for hourly wage earners should be calculated by multiplying the number of hours worked per week times the hourly rate. Section 8-42-102 (2), C.R.S. (2008). As found, the Claimant worked a 40-hour week at $21.50 an hour. An AWW is designed to compensate for a temporary wage loss. *See Pizza Hut v. Industrial Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). An ALJ has the discretion to determine a claimant's AWW, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, the Claimant's AWW is $860.

Temporary Total Disability/Responsibility for Termination

h. A claimant must establish, in the first instance, entitlement to temporary disability benefits. A claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S. (2008); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The injured worker must first establish the prerequisites for temporary disability (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), Temporary disability benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant established each of the prerequisites for TTD since January 19, 2006 and continuing.

i. Section 8-42-105 (4), C.R.S. (2008), provides that an employee responsible for his own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that "responsibility for termination" must be through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Industrial Claim Appeals Office,* 58 P. 3d 1061 (Colo. App. 2002). The Supreme Court has also determined that the "responsibility for termination" defense is not absolute. *Anderson v. Longmont Toyota,* 102 P. 3d 323 (Colo. 2004). As found, Respon-

dents failed to satisfy their burden of proof on the affirmative defense that Claimant was responsible for his termination through a volitional act on his part.

j. When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973, (ICAO, December 18, 2000). Claimant's termination in this case was not the result of a volitional act but the result of the Employer's choice to solve a perceived morale problem. Therefore, Claimant's inability to perform unrestricted work because of his compensable injury necessarily continued, when modified work was no longer made available to him by the Employer.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondent Employers Compensation Insurance shall pay the costs of all authorized medical care and treatment for the May 2005 aggravation of Claimant's back condition, subject to the Division of Workers' Compensation Medical Fee Schedule. The costs of treatment and surgery by Scott Dhupar, M.D., are excluded at this time, and this issue is reserved for additional evidence on whether Respondents were given a reasonable opportunity to offer Claimant alternative medical services or select a surgeon of their choice despite the fact that Respondents were fully contesting the claim.

B. Respondent Employers Compensation Insurance shall pay the Claimant temporary total disability benefits of $573.33 per week, or $81.90 per day, from January 19, 2006 through April 27, 2009, both dates inclusive, a total of 1,194 days, in the aggregate amount of $97, 788.60, which is payable retroactively and forthwith. From April 28, 2009 and continuing until cessation, or modification, of benefits is warranted by law, Respondent Employers Compensation Insurance shall pay the Claimant $573.33 per week in temporary total disability benefits.

C. Respondent Employers Compensation Insurance shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

D. Any and all issues not determined herein, including the authorization of Dr. Dhupar, are reserved for future decision.

DATED this_____day of May 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-768-859

Issues

The issues to be determined by this decision are reduction in benefits due to Claimant's failure to use a safety device, Section 8-42-112(1)(a), C.R.S., and Claimant's violation of an employer safety rule, Section 8-42-112(1)(b), C.R.S.

FINDINGS OF FACT

1. Employer has a safety rule requiring drivers to use a seat belt. Claimant received a written copy of the safety rule. Employer enforces the safety rule by issuing verbal warnings.

2. Claimant sustained a left shoulder contusion and left forearm contusion as a result of the motor vehicle accident that is the basis of this claim.

3. Claimant was not wearing his seatbelt at the time of the motor vehicle accident. Claimant willfully and intentionally failed to obey the safety rule.

4. Claimant's injuries resulted when he rammed his left shoulder and forearm against the door of his tractor.

5. Claimant reported to Dr. Zuehlsdorff that he was using a lap and shoulder seatbelt. In his August 7, 2008, report, Dr. Zuehlsdorff stated "He was dual belted, but he actually rammed his left shoulder and forearm against the door."

6. The evidence does not indicate whether or not Claimant would have sustained injuries had he been using a seat belt as required by Employer.

CONCLUSIONS OF LAW

Compensation may be reduced where the injury is caused by the willful failure of an employee to use safety devises provided by the employer or where the injury results from the employee's willful failure to obey any reasonable rule adopted by the employer. Section 8-42-112 (1) (a) and (b), C.R.S.

Willful conduct may be inferred from the circumstances, including evidence that the claimant was aware of the rule and the obviousness of the danger. *See Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437P.2d 548, (1968).

Respondents have established by a preponderance of the evidence that Claimant willfully violated a reasonable rule adopted by Employer and that Claimant willfully failed to use a safety device provided by Employer. Respondents must also show that Claimant's injuries were caused by, or resulted from, the failure to use a seat belt.

Respondents argue that it is common knowledge in today's society that the purpose of wearing a seat belt is to restrain the occupant in his seat in the case that there is a sudden change in the direction or speed of the motor vehicle. Respondents argue that once it is shown that Claimant was not wearing a seat belt, the burden shifted to Claimant to show that he would have sustain the injuries even if he had been wearing his seatbelt. Those arguments are rejected.

While the purpose of wearing a seat belt is to restrain the occupant in his seat in the case that there is a sudden change in the direction or speed of the motor vehicle, the ALJ does not infer that a seat belt always accomplishes that purpose. This is not a case where the injured worked is injured from being thrown from a vehicle where the passenger area of the vehicle remains intact. Claimant here was injured from striking the driver's side door. There may have been enough play in he seat belt that Claimant would have struck the door even if he had been wearing the seat belt. Claimant might or might not have sustained his injuries if he had been wearing a seat belt. On the evidence presented, the ALJ is not willing to infer that the injuries would not have occurred had Claimant been wearing the seat belt.

Respondents have failed to establish by a preponderance of the evidence that Claimant's injuries were caused by or resulted from the failure to use a seat belt. Insurer may not reduce benefits fifty percent pursuant to Section 8-42-112 (1) (a) and (b), C.R.S.

ORDER

It is, therefore, ordered that Respondent may not reduce Claimant's benefits pursuant to Section 8-42-112(1)(a) and (b), C.R.S. Issues not determined herein are reserved for future determination.

DATED: *May 21, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-769-730

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 19, 2009, in Denver, Colorado. The hearing was digitally recorded (reference: 5/19/09, Courtroom 3, beginning at 8:31 AM, and ending at 10:14 AM).

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Respondent's counsel, to be submitted electronically, giving Claimant 3 working days within which to file objections thereto. The proposed decision was filed on May 21, 2009. No timely objections were filed. After a consideration of the proposal, the ALJ has modified it and, as modified, hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability; if compensable, medical benefits (including authorization); temporary disability benefits; and Respondent's request to withdraw its General Admissions of Liability, based on overpayments.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. On August 22, 2008, the Claimant was employed as a police officer for the Employer. He was responding to a medical emergency at a college. He was running to the call when a bystander advised him that he and his partner were headed in the wrong direction. Claimant made a quick "cut" while running and felt a twinge in his left knee. The ALJ infers and finds that the running and cutting was the initiating cause of the work-related temporary aggravation and acceleration of Claimant's left knee condition. After the call, Claimant experienced pain in his left knee. When he returned to the police station he stood up from his desk after an hour of doing paperwork and his left knee "gave out." The standing up was a normal progression of the aggravation set in motion by the running and cutting. The Claimant presented credibly throughout his testimony, and his testimony established an aggravation of his pre-existing left knee condition when he ran and cut, responding to a call.

2. Claimant went to the emergency room at Sterling Medical Center where he was diagnosed with a left knee strain. The Employer referred him to Robert Fillion, D.O., for medical treatment relating to the August 22, 2008 incident. Dr. Fillion became the Claimant's authorized treating physician (ATP).

3. On September 23, 2008, Respondent filed a General Admission of Liability (GAL), admitting for an average weekly wage (AWW) of $645 and temporary total disability TTD) benefits of $430 per week from August 28, 2008 and continuing.

4. Dr. Fillion assigned work restrictions and the Claimant was off work from August 28, 2008 through October 12, 2008. He was released to return to work, full duty, as of October 13, 2008. Claimant has been working in his normal duty capacity, at full wages, since October 13, 2008.

5. On October 20, 2008, Respondent filed a second GAL, terminating TTD based on Claimant's return to work full duty on October 13, 2008. The ALJ finds that Claimant did not present any persuasive evidence to support a determination that he lost time from work after October 13, 2008.

6. It is undisputed, and the ALJ finds, that Claimant had a history of pre-existing problems in his left knee beginning with an ACL reconstruction surgery in 2003. Treatment records document Claimant's receipt of medical care for his left knee in 2005, 2006, and 2007. Claimant was diagnosed with degenerative joint disease, instability, chondromalacia, and a valgus deformity of the left knee prior to the incident of August 22, 2008.

7. Claimant was referred to Rocci V. Trumper, M.D., for an orthopedic evaluation. Dr. Trumper was of the opinion, on October 6, 2008, that Claimant was having recurrent mechanical symptoms and recommended a knee arthroscopy. Respondent denied the request for authorization of the knee arthroscopy and partial medial menisectomy. On December 23, 2008, Dr. Trumper responded to a letter written by Respondent stating, "it would be my opinion that the vast majority of his injury and symptoms related to his left knee were pre-existing to his injury of August 22, 2008. Certainly, the preponderance of it would not be work related." The ALJ finds this opinion makes it reasonably probable that Claimant's need for surgery is attributable to his pre-existing left knee condition, and not the temporary aggravation caused by the August 22, 2008 "run and cut" incident.

8. Respondent obtained an Independent Medical Examination (IME) with Jeffrey Wunder, M.D., on January 9, 2009. Dr. Wunder was of the opinion that the August 22, 2008 incident did not cause the need for medical treatment or disability. Dr. Wunder stated "the incident at work…has no relationship to the current reported symptoms." Dr. Wunder also was of the opinion that the arthroscopic surgery recommended by Dr. Trumper was not related to the August 22, 2008 incident. Dr. Wunder stated that, even presuming the August 22, 2008 incident caused an aggravation of the Claimant's under-

lying condition, the surgery requested was not treating the effects of the August 22, 2008 aggravation but rather the longstanding pre-existing degenerative condition in claimant's left knee. The ALJ finds Dr. Wunder's opinion on lack of causality to work unpersuasive. The ALJ, however, finds his opinion that the need for surgery is attributable to Claimant's long-standing left knee pre-existing degenerative condition and not the August 22, 2008 incident persuasive and corroborated by the opinion of the treating surgeon, Dr. Trumper.

9. L. Barton Goldman, M.D., retained as an IME for the Claimant, performed the IME on February 5, 2009. Dr. Goldman was of the opinion that the Claimant's pre-existing left knee condition was "aggravated in the course of essential duties of employment as a police officer." Dr. Goldman stated the opinion that the surgery was "medically reasonable and necessary within the context of this claim." The ALJ finds Dr. Goldman's opinion on causality as related to work persuasive, credible and controlling. The ALJ, however, finds that Dr. Goldman's summary opinion with respect to the causal relatedness of the need for surgery outweighed by the opinions of the surgeon, Dr. Trumper, and Respondent's IME Dr. Wunder.

10. Based on Dr. Wunder's opinion concerning causation of the left knee symptoms, Respondent requested to withdraw all previously filed GALs, asserting that the August 22, 2008 incident did not cause a compensable aggravation of the Claimant's pre-existing condition. Respondent also argued that the actual "incident" of August 22, 2008 was not the Claimant's act of running and cutting, but was the Claimant's act of standing up from his desk, an ubiquitous situation, based on Claimant's account of that event being the direct precursor to the Claimant's left knee giving out. As found above, however, the cause of Claimant's left knee injury was running and cutting whereby he felt pain immediately thereafter. The ALJ finds that although Respondent had a good faith argument for withdrawing previous GALs, the ALJ finds this argument misplaced, based on the finding of a compensable injury on August 22, 2008.

11. The ALJ finds the Claimant's testimony regarding the onset of a twinge and pain resulting from cutting while running to a call credible and persuasive. This activity was performed in direct relation to the Claimant's duties as a police officer in the course and scope of his employment. The ALJ also credits the opinions of Dr. Goldman as to the causal connection between the August 22, 2008 incident and the onset of increased symptoms in the Claimant's left knee at that time. The ALJ finds the Claimant has proven, by a preponderance of the evidence that he sustained a compensable aggravation of his underlying left knee condition on August 22, 2008.

12. The ALJ finds the opinions of Dr. Wunder regarding the lack of a causal relationship between the August 22, 2008 incident and the need for arthroscopic surgery, requested by Dr. Trumper, credible and persuasive. Dr. Trumper agreed "the preponderance of it would not be work related." Based on the opinions of Dr. Wunder and Dr. Trumper, the ALJ finds that the Claimant has failed to prove by preponderant evidence that the arthroscopic surgery to the his left knee is causally related to the effects of the August 22, 2008 injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, the Claimant presented credibly throughout his testimony, and his testimony established an aggravation of his pre-existing left knee condition when he ran and cut, responding to a call. The ALJ finds Dr. Goldman's opinion on the compensable aggravation of Claimant's pre-existing left knee condition consistent with the totality of the circumstances and more credible than Dr. Wunder's opinion in this regard. The ALJ, however, finds the opinion of the treating surgeon, Dr. Trumper (corroborated by Dr. Wunder), on the lack of causal relatedness of the need for surgery consistent with the medical history of Claimant's pre-existing left knee condition and more credible and persuasive than Dr. Goldman's summary opinion in this regard,

b. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has sustained his burden with respect to compensability and TTD through Oc-

tober 13, 2008. Claimant has failed to sustain his burden with respect to the causal relatedness of the surgery to the August 22, 2008 compensable injury.

c. Where an insurer seeks to withdraw an admission of liability, it does not have the burden of showing why the admission was improvident, and the burden remains on the claimant to show a compensable injury. *Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo. App. 2001). As found, the Claimant herein has shown a compensable injury, thus, Respondent's previously filed admissions were **not**, in retrospect, "improvident." Indeed, to alow wholesale withdrawals of admissions of liability when a reasonably debatable compensability issue subsequently arises would undermine a basically self-executing workers' compensation system, where litigation is by exception. Where a "pre-existing condition is aggravated by an employee's work, the resulting disability is a compensable industrial disability." *Subsequent Injury Fund v. Thompson,* 793 P.2d 576, 579 (Colo. 1990). As found, Claimant aggravated his pre-existing left knee degenerative condition on August 22, 2008 when he ran and cut, responding to an emergency, during the course and scope of his employment. As further found, the Claimant's action of running and cutting on his left knee during his response to the medical call caused a compensable aggravation of his pre-existing condition. Also, as found, Dr. Goldman's analysis that the August 22, 2008 running incident causing an aggravation of the Claimant's pre-existing condition was credible and controlling herein, with respect to compensability. The ALJ rejects Respondent's argument that the injury was precipitated by the pre-existing left knee condition combining with the claimant's activity of standing up from his desk.

d. Respondent is liable only for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a) C.R.S. (2008); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994). It is the Claimant's burden to prove that an industrial injury is the cause of a subsequent need for medical treatment. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The Claimant bears the burden of proof to establish the right to specific medical benefits, by a preponderance of the relevant evidence. *See Valley Tree Service v. Jimenez,* 787 P.2d 658 (Colo. App. 1990). This principle recognizes that the Claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). As found, Dr. Trumper's recommended surgery is **not** causally related to the temporary, compensable aggravation of August 22, 2008.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Claimant sustained a compensable injury on August 22, 2008 and is entitled to medical benefits and temporary disability benefits as applicable under the Workers' Compensation Act, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Respondent's request to withdraw previously filed General Admissions of Liability filed on September 23, 2008 and October 20, 2008 is hereby denied and dismissed.

C. Temporary total disability benefits from August 28, 2008 through October 12, 2008, as previously admitted by the Respondent are hereby re-affirmed and granted. According to the October 20, 2008 General Admission of Liability these benefits have already been paid. Therefore, there is no need to order the payment of benefits or interest during this time period. Temporary disability benefits from October 13, 2008 through the hearing date, May 19, 2009, are hereby denied and dismissed..

D. The request for arthroscopic surgery to the Claimant's left knee, recommended by Rocci V. Trumper, M.D., is hereby denied and dismissed.

E. Any and all other issues not determined herein are reserved for future decision.

DATED this_____day of May 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-770-217

ISSUES

The issues for determination are compensability and medical benefits.

FINDINGS OF FACT

1. Claimant began work for Employer in August 2007. Claimant's work initially was in Outbound Sales. This position required him to use his voice on a telephone throughout the day, but the use of his voice was not constant.
2. Prior to working for Employer, Claimant had used his voice to sing since he was a teenager. Claimant was 65 years old at the time of the hearing. For a period in 2004 to 2006 Claimant sang with a band. Claimant has also used his voice to make commercials and as an announcer. Claimant had no difficulties with his voice until after he began work for Employer.

3. Claimant first noticed hoarseness in his voice in October or November 2007. He was experiencing vertigo in the same time period.
4. Claimant's job was changed to Inbound Sales after the Fourth of July, 2008. Inbound Sales involved nearly constant use of his voice and caused more stress on his voice than before. Claimant's voice worsened more rapidly.
5. Claimant reported he lost his voice to the H.R. Department of Employer. He was given a sheet with three health care providers circled. One of the providers, Littleton Adventist Hospital, was circled.
6. Claimant sought care from Littleton Adventist Hospital at 2:55 p.m. on Thursday, August 28, 2008. He was seen in the emergency room. His health care providers there were Michael Scheutt, M.D., and Jeffrey Laird. A medical report from that visit stated, "your hoarseness is likely due to overuse but it is important that you rule out other serious causes." It was recommended that he see an ear-nose-throat (ENT) specialist for further evaluation.
7. Employer directed Claimant to Concentra Medical Centers for another examination. Raymond F. Rossi, M.D., examined Claimant. Dr. Rossi's diagnosis was "Other Voice Disturbance." It was noted that Claimant related his condition to his work. Claimant was referred to an ENT specialist. Dr. Rossi stated that Claimant could return to regular duty and recommended that Claimant return for follow-up in one week.
8. Insurer has denied liability. Claimant has not sought further care.
9. A report from Robert W. Watson, Jr., M.D., was presented. Dr. Watson did not examine Claimant and there is no indication Dr. Watson reviewed the medical record. Dr. Watson stated in the report that, "It is unlikely that working in a call center would cause severe voice strain that would result in laryngitis." Dr. Watson also stated that laryngitis is usually caused by a viral or sometimes bacterial infection. The opinions of Dr. Watson are not persuasive.

CONCLUSIONS OF LAW

An "occupational disease" is acquired in the ordinary course of employment and is a natural incident of the employment. *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo.App. 1993).
Section 8-40-201(14), C.R.S., defines an occupational disease as follows:

> `Occupational disease' means a disease which results directly from the employment or conditions under which the work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside the employment.

If an industrial injury aggravates or accelerates a preexisting condition so as to cause a need for treatment, the treatment is compensable. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo.App. 2001); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo.App. 1990); *Seifried v. Industrial Comm'n*, 736 P.2d 1262 (Colo.App. 1986). A claimant is not required to prove the conditions of the employment were the

sole cause of the disease. Rather, it is sufficient if the claimant proves the hazards of employment caused, intensified, or aggravated to some reasonable degree the disability for which compensation is sought. *Anderson v. Brinkhoff,* 859 P.2d 819, 824 (Colo. 1993).

Claimant has established by a preponderance of the evidence that he sustained an occupational disease as a result of the conditions of his employment with Employer.

The claim is compensable.

An insurer is liable for the medical care an injured worker receives that is reasonably needed to cure and relieve the injured worker from the effects of the occupational disease. Section 8-42-101(1), C.R.S. However, the employer has the right, in the first instance, to designate the authorized treating physician. Section 8-43-404(5)(a), C.R.S. 2000. If the claimant obtains unauthorized care, the employer and insurer are not liable to pay for it. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo.App. 1999).

Claimant reported his condition to Employer. Employer circled three medical care providers. Claimant went to Littleton Adventist Hospital, one of the circled providers. Little Adventist Hospital is an authorized provider because Employer referred Claimant there, not because Claimant was seeking emergency treatment. Employer also referred Claimant to Concentra, which is also authorized. The care Claimant received from Littleton Adventist Hospital and Concentra was reasonably needed to cure and relieve Claimant from the effects of the occupational disease. Insurer is liable for the costs of such care, in amounts not to exceed the Division of Workers' Compensation fee schedule. Section 8-42-101(3), C.R.S. Those providers may not recover their costs or fees from Claimant. Section 8-42-101(4), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant has sustained an occupational disease.
2. Insurer is liable for the costs of the care Claimant has received for his occupational disease from Concentra and from Littleton Adventist Hospital.
3. Matters not determined herein are reserved for future determination.

DATED: *May 21, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-770-787

ISSUES

The issues determined herein are temporary total disability ("TTD") benefits and medical benefits, specifically authorization of Dr. Hall.

FINDINGS OF FACT

1. In December 2007, claimant began work as a Legal Secretary I position for the employer.

2. On April 17, 2008, claimant suffered an admitted injury to her left hip when she was putting files in the bottom drawer of a filing cabinet. The cabinet began to tip and claimant stood up to catch the cabinet, causing pain in her hip. Claimant did not immediately report her work injury and she continued to perform her regular job duties.

3. In late May 2008, claimant's job was changed to Legal Secretary County Clerk Records due to problems with claimant's job performance. Her duties continued to include preparing motions to revoke and doing criminal records checks.

4. On June 11, 2008, claimant reported her April 17 work injury.

5. On June 11, 2008, Nurse Practitioner Lafayette examined claimant and diagnosed left sacroiliac ("SI") joint strain and left piriformis muscle strain. He prescribed ibuprofen and physical therapy. He indicated that claimant could return to work at regular duty.

6. Claimant returned to work at her regular duties, including preparing motions and subpoenas in upcoming cases.

7. Dr. Richman examined claimant on July 16, 2008, suspected a labral tear, and recommended a magnetic resonance image ("MRI") of the left hip. The July 31, 2008, MRI was normal.

8. On July 31, 2008, Dr. Richman switched claimant from ibuprofen to vicoprofen.

9. On August 4, 2008, Dr. Richman requested authorization of a referral to Dr. Xenos, a hip specialist.

10. On August 14, 2008, N.P. Lafayette referred claimant to Dr. Ciccone, an orthopedist. Dr. Ciccone examined claimant on August 20, 2008. It was Dr. Ciccone's

opinion that the claimant had internal derangement of the left hip due to a possible fracture or labral tear, with left lumbar radiculopathy and he recommended an MRI arthrogram.

11. On August 27, 2008, N.P. Lafayette saw the claimant, who reported side effects from the vicoprofen. N.P. Lafayette changed claimant to Ultram, a non-narcotic medication, excused claimant from work for the day, and released claimant to return to her regular work on August 28, 2008.

12. The September 12, 2008, MRI arthrogram was normal. In particular, there was no acetabular labral tear or paralabral cyst.

13. On September 17, 2008, Dr. Ciccone discussed a potential intraarticular steroid injection, but he felt the claimant had a soft tissue problem with her hip, suggested a physical therapy program, and told her to use Ibuprofen as prescribed by Dr. Richman. Claimant never returned to see Dr. Ciccone after this date.

14. On September 19, 2008, the employer terminated claimant's employment for substandard performance of her duties and for participating in too many personal phone calls while on duty.

15. On September 22, 2008, the employer filed a general admission of liability for medical benefits only.

16. On September 22, 2008, claimant returned to see Dr. Richman for a routine appointment. Claimant was upset after her termination from employment and she was concerned about the continued provision of medical care. Dr. Richman noted that the MRI arthrogram was normal, but the claimant continued to complain of buttocks, low back and left inguinal pain, without radicular symptoms. Dr. Richman performed a more thorough inguinal examination and had Adrienne Buchanan in the room at that time. Following the examination, Dr. Richman recommended additional treatment in the form of manual therapy with Mr. deJong and continuation of Tramadol. He indicated that claimant should set an appointment for reexamination in four weeks.

17. Following the examination, claimant and Dr. Richman had a discussion concerning claimant's representation by counsel. Claimant stated to Dr. Richman that she had already retained an attorney, Mr. Mullens. Dr. Richman had a policy of not accepting new patients who are being represented by Mr. Mullens, but he will continue caring for existing patients represented by Mr. Mullens. Dr. Richman, however, became upset when claimant indicated that she had retained Mr. Mullens. He informed claimant that he could no longer treat her and he walked away. Dr. Richman disputed this version of the incident and insisted that he merely stated that Mr. Mullens usually tried to get Dr. Richman removed as the authorized treating physician on all cases. Dr. Richman had refused to perform an independent medical examination in another case in which Mr. Mullens represented the other claimant. Dr. Richman explained that he would not take new patients represented by Mr. Mullens. Although Dr. Richman's policy is not

to withdraw from treating all patients represented by Mr. Mullens, his statements to claimant on September 22 reasonably led claimant to believe that Dr. Richman could no longer treat claimant.

18. Claimant called her attorney, Mr. Mullens, to report what had happened with Dr. Richman.

19. On October 1, 2008, claimant called Dr. Ciccone and indicated that Dr. Richman had "dropped' her." Dr. Ciccone then referred claimant to Dr. Timothy Hall, another physiatrist.

20. On October 2, 2008, Mr. Mullens informed respondent about the referral to Dr. Hall. The respondent then designated Dr. Jenks as the authorized treating physician with a scheduled appointment for October 16, 2008.

21. On October 9, 2008, Dr. Hall examined claimant and diagnosed piriformis syndrome, SI joint dysfunction, and left hip capsule sprain. He referred claimant to Chiropractor Wood for active release and manipulation.

22. On October 10, 2008, Dr. Richman responded to a letter from respondent's attorney and stated that he had not withdrawn from the case. He stated that claimant was able to return to full-duty employment.

23. On October 16, 2008, claimant had failed to appear for the first scheduled physical therapy session with Mr. deJong.

24. By letter dated October 20, 2008, Dr. Ciccone indicated that claimant stated that Dr. Richman had told her he was "unable to help her any further" and, therefore, Dr. Ciccone's referral to Dr. Hall was reasonably necessary.

25. On October 21, 2008, the claims adjuster wrote to claimant to inform her that an appointment had been set with Dr. Richman for October 24, 2008. Claimant's attorney replied in writing that claimant objected to this appointment.

26. On October 28, 2008, Chiropractor Wood began treatment of claimant upon referral from Dr. Hall.

27. On November 3, 2008, Dr. Ciccone responded to a letter from respondent's attorney and indicated that claimant personally had requested a pain management referral and Dr. Ciccone had referred her to Dr. Hall. Dr. Ciccone indicated that he frequently refers patients to Dr. Hall.

28. Dr. Richman's letter of November 14, 2008, reports that claimant canceled the "demand" appointment made by respondent's counsel in October 2008. Dr. Richman reiterated that he had not withdrawn from treating claimant, but had a policy not to accept any new patients represented by Mr. Mullens.

29. Dr. Ciccone's referral to Dr. Hall was in the ordinary progression of treating physicians. Dr. Ciccone's referral was not prompted by a misstatement by claimant. Dr. Richman's statements on September 22, 2008, led claimant reasonably to believe that Dr. Richman would no longer treat her. Claimant clearly needed additional physiatrist treatment for pain management. Dr. Hall's treatment is authorized after October 1, 2008.

30. Dr. Hall continued to examine claimant. On January 9, 2009, he administered a Botox injection to stop spasms of the piriformis muscle. Dr. Richman agreed that a one-time trial of Botox was reasonable treatment.

31. At hearing, Dr. Hall confirmed that he had never expressed any opinion about claimant's ability to return to work and that nobody had ever asked his opinions about that issue.

32. Claimant never indicated to her supervisors at the employer that she was physically unable to perform her regular job duties due to the effects of her work injury. She never requested that the employer make any accommodations due to any effects of the work injury.

33. Although claimant believed that she was terminated from employment due to her work injury, that testimony is not persuasive. The employer had concerns about claimant's job performance even before she reported the work injury. In fact, the employer changed claimant's job duties after the work injury, but before she reported the injury.

34. At all times, claimant continued her concurrent work for Pikes Peak Library District as a security guard. As part of her job duties, claimant had to monitor parking lots and library areas, had to stand and walk up to nine hours during a shift, respond to alarms, provide security to staff and patrons, safeguard money, record monthly reports and meters, monitor security cameras, respond to unruly individuals, and escort individuals out of the library. Claimant admitted that she was able to continue to perform these jobs duties after her work injury.

35. The record evidence does not contain any medical opinion that claimant was unable to perform her regular job duties for the employer due to the effects of the work injury. Dr. Richman indicated only that she probably would have a problem sitting on the floor. The regular job duties did not require that claimant sit on the floor. He indicated only that claimant needed to change positions. Her regular job duties allowed her to change positions as needed. Claimant's testimony of disability is not persuasive. She continued to perform her job duties, albeit never completely to the satisfaction of the employer. The parties hotly disputed whether claimant was responsible for her termination from employment, but that issue is unnecessary. Claimant never commenced TTD due to the work injury.

CONCLUSIONS OF LAW

1. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). The respondents are only liable for authorized or emergency medical treatment. See § 8-42-101(1), C.R.S.; *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973). Under § 8-43-404(5), C.R.S., the respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once the respondents have exercised their right to select the treating physician the claimant may not change physicians without permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). A physician may become authorized to treat the claimant as a result of a referral from a previously authorized treating physician. The referral must be made in the "normal progression of authorized treatment." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985). A referral that is based upon the treating physician's independent medical judgment and not manipulative behavior by the claimant is considered a referral in the normal progression of authorized treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo.App. 1997); *Durrough v. Bridgestone/Firestone*, W.C. No. 4-277-896 (Industrial Claim Appeals Office, June 30, 1997). *Clemonson v. Lovern's Painting*, W. C. No. 4-503-762 (ICAO, October 21, 2005) affirmed the Judge's determination that the referral was not in the normal course of authorized treatment because the referral was precipitated by claimant's misstatement to the referring physician that the "workers' compensation" had sent claimant back for a referral for a specialist when the Division of Workers' Compensation had not done so. *Clemonson* is distinguishable because in the current claim Dr. Richman's statements to claimant made her reasonably believe that Dr. Richman was no longer treating claimant. Claimant's statements to Dr. Ciccone about Dr. Richman's actions are not similar to those of the claimant in *Clemonson*. As found, Dr. Ciccone referred to Dr. Hall in the normal progression of authorized treating physicians. Dr. Hall's treatment is authorized after October 1, 2008.

2. As found, claimant has failed to prove by a preponderance of the evidence that she was unable to return to the usual job due to the effects of the work injury. Consequently, claimant is not "disabled" within the meaning of section 8-42-105, C.R.S. and is not entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Claimant is entitled to TTD benefits if the injury caused a disability, the disability caused claimant to leave work, and claimant missed more than three regular working days. TTD benefits continue until the occurrence of one of the four terminating events specified in section 8-42-105(3), C.R.S. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

3. Because claimant failed to prove entitlement to TTD benefits, the affirmative defenses to terminate TTD benefits are moot.

ORDER

It is therefore ordered that:

1. The employer shall pay for the medical treatment by Dr. Hall and his referrals on and after October 1, 2008.

2. Claimant's claim for TTD benefits commencing September 19, 2008, is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

DATED: May 20, 2009

Martin D. Stuber
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-771-545; WC 4-776-686; WC 4-778-861

ISSUES

This is a full contest. Issues for determination are compensability, medical benefits from September 2, 2008 and continuing, temporary total disability from July 31, 2008 and continuing, and the date of injury. At the commencement of the hearing the parties stipulated that for purposes of this occupational disease claim, they will use July 31, 2008 as the date of injury. The parties further stipulated that if the claim was compensable, the average weekly wage is $1,347.60 per week. Also at the commencement of the hearing the parties agreed that the Claimant's restrictions beginning July 31, 2008 and continuing have not been accommodated by the employer. The stipulations were accepted by the ALJ at hearing. The remaining issues were therefore:

I. Whether the Claimant has met his burden of proof demonstrating an occupational disease involving his shoulders and neck.

II. Whether the Claimant is entitled to temporary disability benefits commencing July 31, 2008 and continuing due to his occupational disease.

III. Whether the Claimant is entitled to medical benefits from Dr. Kurz and Dr. Weinstein, and their referrals.

FINDINGS OF FACT

1. The Claimant was hired by Respondent-Employer in March of 1972. For the past 30 plus years he has worked as a senior service gas fitter.

2. On September 2, 2008 the Claimant provided written notice to the Respondent-Employer of an occupational disease involving his shoulders. An Employer's First Report dated September 19, 2008 was filed. Claimant filed an original Worker's Claim for Compensation on November 6, 2008 and an Amended Worker's Claim for Compensation dated December 5, 2008. The Amended Worker's Claim for Compensation indicated injuries to the Claimant's right shoulder, left shoulder, and neck due to repetitive activities at work. The Claimant underwent right shoulder surgery performed by Dr. David Weinstein on July 31, 2008. Since that time, the Claimant has not returned to work. The Claimant has been paid by respondent-employer sick time. Insurer filed a Notice of Contest dated October 15, 2008. No temporary disability benefits have been paid.

3. The Claimant uses a variety of wrenches in order to change out meters and regulators. When using the wrenches this requires a considerable amount of torque and overhead work. The Claimant uses Pogo bars, which are metal bars up to six feet in length in order to probe underground structures. The use of the Pogo bars is physically difficult and requires the Claimant to jam the pole with outstretched arms into the ground. This also requires leverage from above shoulder length height. The Claimant uses hammers including sledgehammers, as well as saws from hand saws to power saws. The use of hammers and saws requires the Claimant to have outstretched arms and overhead use of his arms. The taking down and replacing of ladders on his truck requires overhead arm activity. The Claimant also performs excavations using hand and power tools. These activities all require the Claimant to experience torque of the hands and arms and overhead use of his arms. The Claimant also engages in activities such as welding and from time to time, the use of heavy equipment. Work activities were well documented that establish an occupational disease, over time, to the Claimant's shoulders and neck. Claimant's condition was fully supported by the medical providers and the Medical Treatment Guidelines, Rule 17, Exhibit 4.

4. The most persuasive medical evidence submitted by the parties fully supported the Claimant's testimony as to his work activities and that his condition involving his shoulders and neck were a result of repetitive activities described above which occurred at work.

5. Once the Claimant provided notice of his condition he was referred by the Respondent-Employer to Dr. Nicholas Kurz for primary care. Dr. Kurz, in his records and in testimony at hearing, provided his opinion that the bilateral rotator cuff conditions were caused by the Claimant's work activities.

6. Respondent-Insurer then referred the Claimant to Dr. Velma Campbell for an independent medical examination. Dr. Campbell evaluated the Claimant on November 26, 2008. She was asked to address causation for the right shoulder and not his left shoulder and neck. Dr. Kurz had initially worked up the right shoulder, which was surgi-

cally repaired previously by Dr. Weinstein. In her report, Dr. Campbell documents the Claimant's work activities. Dr. Campbell opines that the Claimant's job activities involving turning wrenches, jamming a pole into the ground by hand to look for lines, swinging hammers, shoveling, hammering, using saws, forceful pushing and twisting with the arms, pulling with the arms and yanking and jerking with the arms has resulted in the chronic overuse strain of right shoulder with degenerative joint disease and chronic tendonitis bursitis with rotator cuff tear as well as surgery and post-operative adhesive capsulitis. Dr. Campbell opined that it was medically more probable than not that these conditions to the Claimant's right shoulder were directly related to the effects of his employment.

7. On January 19, 2009 the Claimant was examined and evaluated by Dr. James DiNapoli. The Claimant was seen for a Claimant's independent medical examination by Dr. DiNapoli. Dr. DiNapoli reviewed the Claimant's job activities which were consistent with the Claimant's testimony and Dr. Campbell's report. Dr. DiNapoli noted that the Claimant's physical activities through the years, "Has involved repetitive and forceful use of the shoulders in positions away from the body, or in positions of higher degrees of flexion and/or abduction." Dr. DiNapoli opined that the Claimant's work-related diagnoses were a right shoulder rotator cuff tear with operative repair, right shoulder post-operative adhesive capsulitis, left shoulder rotator cuff tear, and cervical myofascial pain. Dr. DiNapoli further opined that the Claimant has been disabled from his usual course of employment since the date of surgery of July 31, 2008.

8. The Claimant was referred for a second independent medical examination by respondents to Dr. Henry Roth. In Dr. Roth's report, he concludes that the Claimant's underlying arthritis would not be considered caused by the work-related activities. Dr. Roth does not clearly address the rotator cuff tears in his report or the myofascial neck symptoms. In testimony, Dr. Roth provided that the opinions from Drs. Kurz, Campbell, and DiNapoli were reasonable, but he felt his opinion was stronger because he felt that a metabolic process shown for example by high cholesterol was more likely the cause of the Claimant's arthritic condition. Dr. Roth testified that he did not believe the conditions were work-related.

9. The ALJ finds more persuasive the opinions from Drs. Kurz, Campbell, and DiNapoli over the opinion provided by Dr. Henry Roth. The Claimant has met his burden of proving that it is more likely than not that he sustained an occupational disease involving his shoulders and neck.

10. At the commencement of hearing respondents acknowledged that they had not been able to accommodate the restrictions given to Claimant. The Claimant has not been back to work since July 31, 2008. Dr. Kurz, as the primary authorized treating physician, has provided restrictions to the Claimant that have precluded him from returning to his normal full activities at work. Prior to the Claimant seeing Dr. Kurz, he was equally disabled as documented by the Claimant's testimony and the medical records from Dr. David Weinstein. At the time that the Claimant was first seen by Dr. Kurz he was still recovering from the surgery provided by Dr. Weinstein on July 31, 2008.

The Claimant has met his burden of proving that it is more likely than not that he has been disabled as of July 31, 2008 and continuing and is entitled to temporary disability benefits.

11. The Claimant has received income from the Respondent-Employer. However, the income has been from the Claimant's accumulated sick time over the many years of service for the Respondent-Employer.

12. The parties stipulated to an average weekly wage of $1,347.60. The maximum payable for date of injury on July 31, 2008 in temporary disability benefits is $786.17 per week.

13. The evidence is persuasive that the treatment Claimant has received from Dr. Kurz, Dr. Weinstein, and their referrals is directly related to the occupational disease involving the Claimant's shoulders and neck. Dr. David Weinstein has requested authorization to repair the Claimant's left shoulder. The request has been denied pending the determination of compensability. The medical treatment the Claimant has received from these providers since providing notice to the employer of the work-related nature of the claim is treatment that is reasonable and necessary and related to the occupational disease. The Claimant has requested an award of medical benefits as of the date he provided notice of the work-related nature of his condition which was on September 2, 2008.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado Sections 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents. Section 8-43-201.

2. When determining credibility, the fact-finder shall consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Company v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has

rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. The Claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). The question of whether the Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 716 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

4. Section 8-40-201(14) defines an occupational disease as "a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment." The Claimant has the burden that the alleged occupational disease was caused, aggravated or accelerated by the Claimant's employment or working condition. *Wal-Mart Stores, Inc. v. ICAO*, 989 P.2d 251 (Colo. App. 1999). Once the Claimant establishes a causal connection between employment and his disability, the burden shifts to the respondents to prove a non-work-related cause of the disease. *Masdin v. Gardner-Denver-Cooper Industries, Inc.*, 689 P.2d 714 (Colo. App. 1984). Occupational diseases are injuries which are not due to an accident but instead result from the conditions of employment over a long period of time. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). An occupational disease is compensable if employment conditions act upon an employee's pre-existing weakness or hypersensitivity to produce a disabling condition which would not have existed absent the employment conditions. *Denver v. Hansen*, 650 P.2d 1319 (Colo. App. 1982). The Claimant provided persuasive evidence of his day-to-day activities with the Respondent-Employer. The Claimant has met his burden of proof that he sustained a compensable occupational disease involving his shoulders and neck including the diagnoses of chronic overuse strain of right shoulder with degenerative joint disease and chronic tendonitis bursitis with rotator cuff tear, surgery and post-operative adhesive capsulitis of the right shoulder, left shoulder rotator cuff tear, and cervical myofascial pain.

5. Temporary total disability benefits compensate an injured employee for wage loss or impaired earning capacity during the healing time following a compensable injury. *Eastman Kodak Company v. Industrial Commission of State of Colorado*, 725 P.2d 107 (Colo. App. 1986). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson County Schools v. Headrick*, 734 P.2d 659 (Colo. App. 1986). The primary authorized treating physician's opinion on restrictions and the Claimant's ability to return to work are dispositive. *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995). The Claimant

has met his burden that he has been disabled and that the disability is directly related to his occupational disease. Prior to the Claimant seeing Dr. Kurz, he was equally disabled as documented by the Claimant's testimony and the medical records from Dr. Weinstein and Dr. DiNapoli. Further, testimony of the Claimant is sufficient to prove causation and inability to work and therefore entitlement to temporary disability benefits in the absence of medical documentation. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

6. The Claimant has met his burden of proof that he has been disabled as of July 31, 2008 and continuing through the present.

7. Respondents argue that the Claimant has continued to receive wages and therefore temporary disability benefits would be duplicative. However, what the Claimant has continued to receive is his own sick and vacation time. The Claimant had accumulated many hours of sick time over the many years he had worked for the employer. However, it is not appropriate to simply pay the Claimant with his own money. The Claimant is entitled to two-thirds of his average weekly wage, up to the statutory maximum, during his period of disability commencing July 31, 2008 and continuing. There is no offset or reduction in Workers' Compensation benefits if the employer requires the injured worker to use sick leave or vacation time instead of taking disability leave. In fact, the Claimant remains entitled to full temporary disability benefits even though payment has been received for sick leave and vacation time. See Section 8-42-124(4), C.R.S.; *Public Service Company of Colorado v. Johnson*, 789 P.2d 487 (Colo. App. 1990).

8. The parties stipulated to an average weekly wage of $1,347.60. The maximum payable for date of injury on July 31, 2008 in temporary disability benefits is $786.17 per week which is less than two-thirds of the Claimant's average weekly wage. He is therefore entitled to the maximum in temporary total disability benefits of $786.17 per week.

9. Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the occupational disease. Section 8-42-101(1)(a), C.R.S. The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Officei*, 53 P.3d 1192 (Colo. App. 2002). When considering whether proposed medical treatment is reasonable and necessary, the ALJ may consider not only the relevant medical opinions, but also other circumstances including the Claimant's subjective desire for the treatment, the Claimant's subjective experience of pain, and the results of the Claimant's previous medical treatment. *Grigsby v. Denny's Restaurant*, W.C. No. 4-010-016 (ICAO June 29, 1995). As determined in Finding of Fact 13, the Claimant proved it is more probably true than not that the treatment he has received from Dr. Kurz and Dr. Weinstein as of September 2, 2008 constitutes reasonable and necessary medical treatment to relieve the effects of the occupational disease.

10. As determined in Finding of Fact 13, the Claimant proved it is more probably true than not that the need for the medical care with Dr. Nicholas Kurz and Dr. David Wein-

stein, including the proposed surgery on the Claimant's left shoulder by Dr. David Weinstein, is causally related to the occupational disease of July 31, 2008.

ORDER

It is therefore ordered that:

1. Claimant's claim is compensable for his shoulders and neck.

2. Respondent-Insurer shall pay to the Claimant temporary total disability benefits at the rate of $786.17 per week commencing July 31, 2008 and continuing.

3. Respondent-Insurer shall pay for medical treatment, which has been provided to cure and relieve the effects of the Claimant's injury, including the treatment of Dr. Nicholas Kurz and Dr. David Weinstein as of September 2, 2008 and including Dr. Weinstein's request for left rotator cuff repair surgery. Insurer shall pay for the medical treatment provided to cure and relieve the effects of the Claimant's injury received as a result of direct referral from Dr. Kurz and Dr. Weinstein.

4. Insurer shall pay for ongoing medical treatment that is authorized and reasonably necessary to cure and relieve Claimant from the effects of the injury.

5. Insurer shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

6. Issues not expressly decided herein are reserved to the parties for future determination.

DATE: May 28, 2009
/s/ original signed by:

Donald E. Walsh
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-775-314

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 12, 2009, in Denver, Colorado. The hearing was

digitally recorded (reference: 5/12/09. Courtroom 1, beginning at 10:20 AM, and ending at 12:00 PM).

At the conclusion of the hearing, the ALJ established a briefing schedule (briefs to be filed electronically); Claimant's opening brief to be filed within 5 working days, or by May 19, 2009: Respondent's answer brief to be filed within 5 working days of the opening brief, or by May 27, 2009. Claimant waived the reply brief. Claimant's opening brief was filed on May 19, 2009. Respondents' answer brief was filed on May 27, 2009. The matter was deemed submitted for decision on May 27, 2009.

ISSUES

The issues to be determined by this decision concern compensability of a claimed back injury of September 14, 2008; if compensable, medical benefits; average weekly wage (AWW); and, temporary total disability (TTD) benefits from October 20, 2008 and continuing.

Respondents raised the affirmative defense that Claimant was responsible for her termination on April 29, 2009

At the commencement of the hearing, the parties stipulated that Claimant's AWW is $229.90, and the ALJ so finds; and, that Julie Parsons, M.D., is an authorized treating physician (ATP), and the ALJ so finds.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

The Incident

1. On September 14, 2008, Claimant was working for the Employer as an event coordinator. During the course of this activity, she was called upon to redecorate artificial fichus trees having a weight of between five and ten pounds. She lifted them from the floor to a table where they were to be refurbished. She noted an uptake of low back pain after lifting them but continued to perform her required work activities.

2. Sometime thereafter, the Claimant was carrying fichus trees to the front of the store when a customer stopped and asked her to climb a ladder to bring down floral

arrangements that weighed about five pounds. Her back pain accelerated from this activity. She reported this pain to her Department Manager, Judy Stell. She did not ask for a medical referral on September 14, 2008.

3. Aimee Cruz, Assistant Store Manager, testified that Claimant reported on September 20, 2008, that Claimant was assisting a customer with a floral arrangement on September 14, 2008, and the Claimant was going up and down a ladder to bring the customer floral pieces. The ALJ infers and finds that the incident involved going up and down a ladder once. Claimant reported injury to her back. According to Cruz, the floral arrangements are made out of silk, Styrofoam and weigh less than three pounds.

4. Brad Frese, Store Manager, completed the First Report of Injury noting an alleged back injury after repetitive motions of going up and down the ladder. The ALJ infers and finds that Frese, who was not present on the day in question, was mistaken on the "repetitive motions," and Cruz's testimony is more reliable.

5. On Wednesday, September 17, 2008, when her low back pain did not subside, Claimant attempted to report her injury to Jim Van Natten, the Store Manager. He was not in the store on that day, neither was Assistant Manager Amy Cruz.

6. Claimant called the Employer again on September 18, and 19, 2008. Van Natten was not at the store on either day.

7. Both the Claimant and Cruz testified that Claimant finally reported her injury to Cruz on September 20, 2008.

8. Claimant was not immediately sent for medical treatment at that time and her low back pain continued to persist over time, without medical treatment.

Pre-Existing Back Condition

9. The Claimant has a prior history of low back problems dating back to a 1992 work related injury with Wal-Mart for which she received an impairment rating in 1994. She was given permanent restrictions from that injury at that time.

10. Claimant told the Employer that she suffered a preexisting back injury while working for Wal-Mart in 1992. Claimant, however, prior to employment with the Employer, told the Employer that her preexisting back injury had healed. Claimant stated that her job with the Employer did not involve lifting or moving heaving objects.

11. According to the Claimant, the Employer did not request or require her to lift or move heavy objects; and, she did not lift or move heavy objects. For example, Claimant stated that employees from the receiving department would carry Event Kits into the classroom for Claimant. Also, Claimant testified that if tables or heavy items needed to be moved, other store associated would move them for Claimant.

12. As a result of the 1992 Wal-Mart back injury, Kathy McCranie, M.D., on April 28, 1994, assigned Claimant permanent work restrictions, placing the Claimant in the Sedentary work category.

13. On September 1, 1993, Michael McNally, M.D., expressed the opinion that Claimant would not have any success getting back to work; Claimant reports acute pain in the back which has radiated to both legs; Claimant relates the pain is aggravated by almost any activity. The ALJ finds that Dr. McNally's opinion was in error, as illustrated by the Claimant's work for the Employer herein.

14. On April 28, 1994, Dr. McCranie's impressions were chronic low back pain, intervertebral disk and bulging at L5-S1 and myofascial involvement of the left gluteal region. Claimant suffered preexisting back and lower extremity injuries.

15. Following Claimant's release 1994 at maximum medical improvement (MMI) for the 1992 injury, and the passage of time after the 1992 injury, her condition had improved dramatically and prior to starting work with the Employer in 2008 she was pain free. The ALJ finds her testimony in this regard persuasive, credible and essentially undisputed

16. While working for the Employer, the Claimant was able to perform all of the essential functions of her job and was not under disability until her injury of September 14, 2008. Also, Claimant had not received medical care for her 1992 injury since 1994.

Medical Concerning September 14, 2008 Incident

17. Eventually, Claimant's back pain got so bad that it demanded medical attention and the Employer referred her to Julie Parsons, M.D., at HealthOne. Claimant saw Dr. Parsons on October 20, 2008. Dr. Parsons diagnosed a thoracolumbar strain. The ALJ infers and finds that based on the four corners of Dr. Parsons' report, she is of the opinion that the thoracolumbar strain was caused by the Claimant's job duties with the Employer on September 14, 2008. On October 20, Dr. Parsons gave the Claimant restrictions of fifteen pounds lifting, pushing, pulling and carrying. Claimant also was given restrictions of limited bending and twisting.

18. In her Supplemental Answers to Interrogatories, number 3 (admitted into evidence), Claimant indicates that while she was at home, her left leg gave out. Also, Dr. Parson's November 17, 2008 medical report notes Claimant got back pain and her left leg buckled while she was walking with a couple of Christmas stocking in her hand and a small box of glitter. The ALJ infers and finds that her left leg gave out because of the incident of September 124, 2008.

19. Due to back pain, the Claimant stopped working on October 20, 2008 and she has not returned to work since then, and she was never given a written offer employment within her restrictions. Also, Claimant has not been released to return to full duty no has she earned wages or been declared to be at maximum medical improvement (MMI), as of the hearing date.

20. On October 31, 2008, Bradley Frese, an Employer management representative, told the Claimant that the Employer could not accommodate her restrictions.

21. Claimant has not received medical treatment since November 24, 2008. The adjuster at Gallagher Bassett, agent of the insurer, informed Claimant that her case was under denial and that no further medical treatment would be authorized. This is undisputed. Based on this communicated denial, the ALJ finds that the Claimant was denied further medical treatment for non-medical reasons, after the Respondents had a reasonable opportunity to furnish further medical treatment by Dr. Parsons or to offer substitute medical treatment.

22. On April 7, 2009, F. Mark Paz, M.D., performed an Independent Medical Examination (IME) of the Claimant, at Respondents' request, for the primary purpose of determining causality. Dr. Paz diagnosed low back pain, based on lumbar degenerative disc disease. Dr. Paz was of the opinion that "it is not medically probable that climbing up and down the ladders is a likely explanation for her current symptoms." Further, he

was of the opinion that Claimant did not sustain a **permanent** aggravation of a preexisting condition. The ALJ finds that Dr. Paz's opinion in this regard is contrary to the totality of the lay and other medical evidence. Furthermore, Dr. Paz employs an inappropriate measure for a compensable "aggravation and acceleration" of a preexisting condition, *i.e.,* "**permanent**" aggravation, which, in part, compromises his ultimate opinion on causality. Additionally, the ALJ finds the ATP's (Dr. Parsons') implied opinion of causal relatedness more persuasive and credible than Dr. Paz's opinion.

23. The exhibits contain a termination letter dated April 29, 2009. This letter states that Claimant is being terminated because she failed to fill out a Leave of Absence packet after having requested a leave of absence beginning October 30, 2008.

24. Claimant never requested a leave of absence from the Employer. She did not request leave and was not asked by her Employer to request a Leave of Absence. The ALJ finds Claimant's testimony in this regard credible and reasonable because Claimant was temporary and totally disabled from her workers' compensation injury, and the completion of a Leave of Absence form was not required of her.

25. Respondents introduced the Employer's store Employee Handbook, concerning "leave issues," and the only reference to a potential termination over leave of absence issues is failure to provide medical certification to justify leave. To terminate an employee who is claiming a work-related injury, based on failure to submit "leave of absence" forms borders on a pretextual reason for termination.

26. The Employee Handbook makes repeated reference to an employee's "Request for Leave of Absence." It informs the employee that he/she is entitled to a leave of absence under the FMLA (family Medical Leave Act) and various other leave policies. Claimant never requested a leave of absence under FMLA, or otherwise, and therefore, did not violate the Employer's policies.

27. Respondents failed to prove that Claimant precipitated her termination from employment by a volitional act that the she would **reasonably expect** to result in a loss of her employment.

Ultimate Findings

28. Claimant has proven, by a preponderance of the evidence that she sustained a compensable injury to her back on September 14, 2008, while performing duties for her Employer, and this injury arose out of the course and scope of her employment for the Employer. Claimant has further proven, by preponderant evidence that the agent of the insurance carrier denied the Claimant further medical treatment on or about November 24, 2008 for non-medical reasons. Consequently the right of selecting an authorized treating physician (ATP) passed to the Claimant at that time.

29. The Claimant's AWW is $229.90, which yields a TTD rate of $153.27 per week, or $21.90 per day.

30. The Claimant has not been released to return to work without restrictions since October 20, 2008; she has not earned wages since that time; and, she has not been declared to be at MMI. Consequently, the Claimant has proven by preponderant evidence that she has been TTD since October 20, 2008.

31. Respondents have failed to prove, by a preponderance of the evidence that Claimant was responsible for her termination on April 8, 2009, through a volitional act on her part. To show that the Claimant was responsible for her termination, Respondents were required to prove that Claimant committed a **volitiona**l act, or **exercised control over her termination**, in light of the totality of the circumstances. Respondents failed to do this.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). As found, the ATP's (Dr. Parsons) implied opinion on causality, plus the totality of the Claimant's testimony, is more persuasive and credible than Dr. Paz's opinion on causality. Also, as found, the Claimant's testimony was credible and persuasive.

b. It is undisputed that Gallagher Basset, the claims management agent of the insurance carrier, denied the Claimant medical treatment on November 24, 2008 for non-medical reasons. *See, Annotation, Comment: Credibility of Witness Giving Uncontradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Claimant has sustained her burden with respect to compensability; medical benefits (authorization, causally related, and reasonable necessity); AWW; and, TTD. Respondent has failed to sustain its burden with respect to "responsibility for termination."

Compensability

d. An injury is compensable if incurred by an employee in the course and scope of employment. Section 8-41-301(1)(b), C.R.S. (2008); *Price v. ICAO,* 919 P.2d 207 (Colo. 1996). Claimant must show a connection between the employment and the injury, such that the injury has its origins in the employee's work-related functions, and it is sufficiently related to those functions to be considered part of the employment contract. See *Madden v. Mountain W. Fabricators*, 977 P.2d 861 (Colo. 1999). In order to prove causation, medical evidence is not necessary. As found, the Claimant's testimony and the constellation of facts surrounding her injury establish the requisite nexus between the injury and her work duties. *Also See Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

e. Further, if an industrial injury *aggravates, accelerates, or combines* with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). It is not required that the aggravation and acceleration be permanent in nature. As found, the Claimant's work activities of September 14, 2008 aggravated and accelerated her un-

derlying degenerative back condition so as to disable Claimant and require medical treatment.

f. Respondents argument that Claimant's low back injury was a natural progression of her 1992 back injury is rejected. As found, following being released at MMI for her 1992 low back injury, her condition improved to the point that she was able to perform all of the essential functions of her job with Employer until her subsequent September 14, 2008, back injury. Medical records support and corroborate Claimant's testimony. As found, her testimony credible. See *Lymburn v. Symbois Logic,* 952 P.2d 831 (Colo. App. 1997). As further found, following Claimant's release at MMI in 1994 for the 1992 injury, she improved dramatically and was pain free before starting work for the Employer herein.

Medical Benefits

g. If the physician selected by the Employer (Dr. Parsons) refuses to treat for non-medical reasons, and the insurer fails to appoint a willing ATP after notice of the refusal to treat, the right of selection passes to the injured worker. *Weinmeister v. Cobe Cardiovascular, Inc.,* W.C. No. 4-657-812 [Industrial Claim Appeals Office (ICAO), July 10, 2006]. *Also see Lutz v. Industrial Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Ruybal v. University Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988). As found, an adjuster with the insurer's adjustment agency informed the Claimant that further medical treatment would be denied because the claim was denied. Therefore, the right of selection of a treating physician passed to the Claimant and remains with her to this day.

h. Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101 (1)(a), C.R.S. (2008); *Snyder v. Indus. Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Further, Respondents are liable if the employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause a need for medical treatment. Section 8-41-301(1)(c); *Snyder v. Indus. Claim Appeals Office*, *supra*. Also, medical care is not subject to apportionment for injuries occurring after July 1, 2008. Section 8-42-104(3), C.R.S. (2008). As found, all of the medical care and treatment rendered by Dr. Parsons was reasonably necessary to cure and relieve Claimant of the effects of the September 14, 2008 compensable injury.

Temporary Disability

i. Claimant is not required to prove that her work-related injury was the *sole* cause of her wage loss in order to establish eligibility to TTD benefits. Rather, the benefits are precluded *only* when the work-related injury plays "*no part* in the subsequent wage loss (emphasis supplied)." *Horton v. Indus. Claim Appeals Office,* 942 P.2d 1209, 1210-1211 (Colo. App. 1996). To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss that, "to some degree," is the result of the industrial disability. Section 8-42-103(1), C.R.S. (2008); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses her employment for other reasons which are not her responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair her opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973, (ICAO, December 18, 2000). As found, Claimant's termination in this case was not her fault.

j. The term "disability" connotes two elements: the first is "medical incapacity" evidenced by loss or reduction of bodily function. There is no statutory requirement that the Claimant present medical opinion evidence from of an attending physician establish her physical disability. See *Lymburn v. Symbois Logic*, *supra*. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. The second element is loss of wage earning capacity. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of "disability" may be evidenced by a complete or partial inability to work, or physical restrictions that preclude the claimant from securing employment. The testimony in *Horner* proved this element. As found, Claimant suffered both and this had an adverse impact on her ability to perform her job. *Absolute Employment Service, Inc. v. ICAO,* 997 P.2d 1229 (Colo. App. 1999) [construing disability for purposes of apportionment]. As found, from October 20, 2008 and continuing, the Claimant has been unable to return to her usual job due to the effects of her September 14, 2008, injury. Consequently, she is "disabled" under Section 8-42-105, C.R.S. (2008), and is entitled to TTD benefits from October 20, 2008 and continuing, until terminated by statute. *Culver v. Ace Electric, supra*; *Hendricks v. Keebler Company,* W.C. No. 4-373-392 (ICAO, June 11, 1999.).

k. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, modified employment is not made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, Claimant has met these criteria since October 20, 2008, sustaining a 100% temporary wage loss.

Responsibility for Termination

l. Respondents must prove that the Claimant was responsible for her termination, through a volitional act on her part, in order to trigger the application of Sections 8-42-103(1)(g) and, or of 8-42-105(4), C.R.S. (2008); *CCIA v. Industrial Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000). As found, Respondent has failed to prove "responsibility for termination."

m. To show that the Claimant was responsible for her termination Respondent was required to prove that Claimant committed a **volitiona**l act, or **exercised control over her termination**, in light of the totality of the circumstances. *See Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Padilla v. Digital Equipment*, 902 P.2d 414 (Colo. App. 1994). As found, Respondent failed to do this. An employee is responsible for termination only if the employee precipitated the employment termination by a volitional act that the employee would **reasonably expect** to result in a loss of employment. See *Patcheck v. Colorado Department of Public Safety*, WC# 4-432-301 (ICAO April 27, 2001). As found, Claimant did not volitionally precipitate her termination from employment.

n. The fact that an employer discharges an employee, **even in accordance with the employer's policy**, does not establish that a claimant acted volitionally, or exercised control over the circumstances of termination. *See Gonzalez v. Industrial Commission*, 740 P.2d 999 (Colo. 1987); *Goddard v. EG&G Rocky Flats, Inc.*, 888 P.2d 369 (Colo. App. 1994) [cited with approval in *Kneffer v. Kenton Manor*, W.C. No. 4-557-781 (ICAO, March 17, 2004); *Quinn v. Pioneer Sand Company*, W.C. No. 590-561 (ICAO, April 27, 2005); *Whiteman v. Life Care Solutions*; W.C. No. 4-523-153, (ICAO, October 29, 2004) [both *Quinn* and *Whiteman* stand for the proposition that if effects of injury render Claimant incapable of performing job offered, Claimant not responsible for termination]; *Hall v. Wal-Mart Stores, Inc*., W.C. No. 4-601-953 (ICAO, March 18, 2004) [Respondent cannot adopt a strict liability personnel policy which usurp's the statutory definition of "responsibility" for termination where Claimant engaged in a fight it at work but did not provoke assault]; *Maes v. CA One Services, Inc.*, W.C. No. 4-543-840 (ICAO, March 3, 2004); *Wilcox v. City of Lakewood*, W.C. No. 4-76-102 (ICAO, February 13, 2004); *Gallegos v. Sealy, Inc.*, W.C. No. 4-529-704 (ICAO, February 12, 2004); *Fahey v. Brede Exposition Services*, W.C. No. 4-522-492 (ICAO, January 21, 2003); *Bonney v. Pueblo Youth Service Bureau*, W.C. No. 4-485-720 (ICAO, April 24, 2002) [Claimant was not responsible for failure to comply with employer's absence policy if Claimant was not physically able to notify the employer*]; see e.g., Bell v. Industrial Claim Appeals Office*, 93 P .3d 584, (Colo. App. 2004) [Claimant not at fault for termination for refusing to sign settlement agreement waiving statutory rights]. As found, Claimant could not comply with the Employer's leave of absence policy when the Claimant had not requested a leave of absence to begin with.

o. Further, the reason for the discharge, at the time of discharge, is dispositive on the issue of "at fault" termination. *Elliott v. Hire Calling Holding Company*, W.C. No. 4-700-819 (ICAO, November 16, 2007). It is not enough that the Employer later asserts additional reasons to justify a discharge if, at the time of discharge, the Claimant's conduct was not caused by his/her volitional act. As found, Claimant was terminated by the Employer on April 29, 2009 because she allegedly failed to complete Leave of Absence forms following her alleged request for a leave of absence. As found, the Claimant never requested, and did not want, a leave of absence. Further, the Employer never specifically mandated that Claimant request a leave of absence while her compensable injury was under denial and she had not been placed at MMI. Thus, Claimant did not commit a volitional act triggering the application of Section 8-42-103 (1)(g) or Section 8-42-105 (4) C.R.S. (2008), for her April 29, 2009, termination.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. That Claimant suffered a compensable injury on September 14, 2008, for which she is entitled to medical care with Dr. Parsons.

B. Because the Insurer herein refused Claimant further medical treatment for non-medical reasons on November 24, 2008, Claimant is entitled to select an authorized treating physician of her choice and Respondents shall pay the costs of such causally related and reasonably necessary medical treatment, subject to the Division of Workers' Compensation Medical fee Schedule.

C. For the period from October 21, 2008 through the hearing date, May 12, 2009, both dates inclusive, a total of 203 days, Respondents shall pay the Claimant temporary total disability benefits of $153.11 per week, or $21.90 per day, in the aggregate amount of $4,445.70, which is payable retroactively and forthwith. From May 13, 2009, Respondents shall continue paying the Claimant temporary total disability benefits of $153.11, until terminated by statute.

D. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of May 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-775-869

ISSUE

Whether Claimant has established by a preponderance of the evidence that she suffered a left knee injury during the course and scope of her employment with Employer on October 24, 2008.

STIPULATIONS

The parties agreed that, if Claimant suffered a compensable left knee injury, she is entitled to the following:

1. All reasonable and necessary medical expenses related to the injury;

2. Laura Caton, M.D. is the Authorized Treating Physician (ATP);

3. Temporary Total Disability (TTD) benefits from October 25, 2008 until terminated by statute;

4. An Average Weekly Wage (AWW) of $266.71 for the period October 25, 2008 through November 30, 2008;

5. An AWW of $371.43 beginning December 1, 2009.

FINDINGS OF FACT

1. On June 14, 2008 Claimant began working for Employer as a school bus driver. Her job duties included performing a pre-trip bus inspection, driving the bus over a scheduled route, maintaining proper student behavior and cleaning the interior and exterior of the bus. Claimant's job required her to lift 20-50 pounds, sit, stand and walk.

2. Claimant was also required to possess the physical and mental abilities sufficient to perform her job functions. In fact, on June 20, 2008 Claimant underwent a pre-employment physical. The physical revealed that Claimant did not have any impairment to her extremities.

3. On October 1, 2008 Claimant visited her personal physician because she was experiencing left leg pain. She reported that she had been suffering from pain in the back of her left leg. An x-ray of Claimant's left knee was negative. Claimant's personal physician did not impose any work restrictions as a result of the left leg pain.

4. On October 9, 2008 Claimant underwent an ultrasound of her left knee. The ultrasound was negative.

5. On October 24, 2008 Claimant reported to work and began to inspect her bus. She stepped onto the first step of the bus and felt a "pop" in her left knee. Claimant immediately experienced a stabbing pain. The pain was more severe than the left knee pain she had experienced in early October 2008.

6. Claimant attempted to continue inspecting her bus but was unsuccessful because of her knee pain. She contacted employee Sandy Acevedo using her two-way radio and requested assistance.

7. Ms. Acevedo responded to Claimant's request and helped Claimant off the bus. Ms. Acevedo then transported Claimant in a wheelchair to Employer's dispatch office.

8. Ms. Acevedo testified that, when Claimant reported for work on October 24, 2008, her knee was swollen. However, Claimant denied that her left knee was swollen on October 24, 2008. She testified that, because she was wearing jeans, Ms. Acevedo was unable to observe her knee.

9. Employer's Director of Transportation Brad Johnson testified that, on October 24, 2008, he was informed that an employee had been injured. He went to the dispatch office and observed Claimant sitting in a wheelchair. Claimant was crying and in obvious pain and distress. Mr. Johnson testified that he asked Claimant if she had been injured at work and she replied that she had injured her left knee over the weekend at home. However, Claimant denied that she told anyone that she had injured her knee at home.

10. Ms. Acevedo and Mr. Johnson offered to call an ambulance to transport Claimant to a hospital. However, Claimant refused because she was concerned about the cost of the ambulance. Instead, Claimant contacted her mother and daughter. They transported her to the North Colorado Medical Center Emergency Room.

11. At the emergency room Claimant reported that she was experiencing left knee pain. She stated that she was unable to move her left knee or leg. Claimant explained that she had a one-month history of intermittent left knee pain. However, she felt the sudden onset of knee pain when climbing the stairs on her bus. The emergency room medical provider noted that Claimant had limited range of motion and characterized Claimant's condition as "acute on chronic" left knee pain.

12. On October 30, 2008 Claimant visited ATP Dr. Caton for an evaluation of her left knee condition. Claimant reported a two-month history of left knee pain that she described as "soreness without mechanism." She explained that she was getting on her bus when she "felt something more on back of left knee and couldn't walk." Claimant stated that on October 24, 2008 her "knee just 'went out' behind her and popped." Upon examination Claimant was unable to flex or extend her knee. She was also unable to

bear weight on her left knee. Dr. Caton determined that Claimant could not work and recommended a left knee MRI.

13. On November 6, 2008 Claimant underwent an MRI of her left knee. The MRI revealed a "[c]omplete radial tear posterior horn of the medial meniscus occurring near the root attachment into the tibia. There is associated mild to moderate medial extrusion."

14. On November 7, 2008 Claimant again visited Dr. Caton for an evaluation. Dr. Caton noted that Claimant's MRI findings revealed a "complete radial tear of posterior medial meniscus nerve root." She noted that the MRI findings were consistent with Claimant's presentation. Dr. Caton reported that her objective findings were also consistent with a work related mechanism of injury. She continued Claimant's restrictions of no driving, minimal weight bearing and the use of a walker.

15. On November 20, 2008 Insurer's Physician Advisor James McElhinney, M.D. issued a report after reviewing Claimant's medical records. He concluded that the claim should be denied based on Claimant's preexisting left knee condition. Dr. McElhinney explained that climbing up one step is simply an activity of daily living. He remarked that there was "nothing specific about getting on the bus other than it happened to increase the symptoms that she had previously complained of."

16. On November 24, 2008 Employer terminated Claimant from employment. Because of her knee condition, Claimant was unable to perform her job duties as a school bus driver.

17. Claimant has established that it is more probably true than not that she suffered an injury to her left knee during the course and scope of her employment on October 24, 2008. Claimant's job duties as a bus driver aggravated, accelerated, or combined with her pre-existing left knee condition to produce a need for medical treatment. Claimant credibly explained that she stepped onto the first step of a bus and felt a "pop" in her left knee. She immediately experienced a stabbing pain that was more severe than the left knee pain she had experienced in early October 2008. Furthermore, an October 1, 2008 x-ray of Claimant's left knee was negative, but a November 6, 2008 MRI revealed a "complete radial tear of posterior medial meniscus nerve root." The conditions of Claimant's employment thus constituted the precipitating cause of her left knee injury. Therefore, the special hazard doctrine is inapplicable and does not preclude the compensability of the October 24, 2008 incident.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the

evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. However, when the precipitating cause of an injury is a pre-existing condition that the claimant brings to the workplace, the injury is not compensable unless a "special hazard" of the employment combines with the pre-existing condition to contribute to the injury. *In Re Shelton,* W.C. No. 4-724-391 (ICAP, May 30, 2008). The rationale for the rule is that, in the absence of a special hazard, an injury due to the claimant's pre-existing condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. *Id.* A condition does not constitute a "special hazard"

if it is "'ubiquitous' in the sense that it is found generally outside of the employment." *In Re Booker,* W.C. No. 4-661-649 (ICAP, May 23, 2007).

7. As found, Claimant has established by a preponderance of the evidence that she suffered an injury to her left knee during the course and scope of her employment on October 24, 2008. Claimant's job duties as a bus driver aggravated, accelerated, or combined with her pre-existing left knee condition to produce a need for medical treatment. Claimant credibly explained that she stepped onto the first step of a bus and felt a "pop" in her left knee. She immediately experienced a stabbing pain that was more severe than the left knee pain she had experienced in early October 2008. Furthermore, an October 1, 2008 x-ray of Claimant's left knee was negative, but a November 6, 2008 MRI revealed a "complete radial tear of posterior medial meniscus nerve root." The conditions of Claimant's employment thus constituted the precipitating cause of her left knee injury. Therefore, the special hazard doctrine is inapplicable and does not preclude the compensability of the October 24, 2008 incident.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable injury to her left knee during the course and scope of her employment with Employer on October 24, 2008.

2. Respondents shall pay all of Claimant's reasonable and necessary medical expenses related to her October 24, 2008 left knee injury.

3. Laura Caton, M.D. is Claimant's ATP.

4. Claimant earned an AWW of $266.71 for the period October 25, 2008 through November 30, 2008 and an AWW of $371.43 beginning December 1, 2008.

5. Respondents shall pay Claimant TTD benefits for the period October 25, 2008 until terminated by statute.

6. Any issues not resolved in this Order are reserved for future determination.

DATED: May 15, 2009.

Peter J. Cannici
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-777-113

ISSUES

¬ The issue for determination was whether Colorado has jurisdiction for Claimant's industrial injury of June 12, 2008.

FINDINGS OF FACT

1. Claimant is a heavy machinery operator who currently resides in Cortez, Colorado. Claimant has lived in Cortez, Colorado since 2003. Claimant has operated a bulldozer for employer on various occasions since 2003. Claimant's employment with employer has included working in Mountain Pass, California for approximately ten (10) months in 2005 and in Kingman, Arizona for approximately six (6) months in 2003.

2. Claimant testified that he had worked for various employers in Colorado since 1994, including Ute Mountain Sand and Gravel. Claimant also testified on cross-examination that he worked for Lisbon Valley Mine in Utah. Claimant collected unemployment benefits from the state of Utah after being laid off from the Lisbon Valley Mine.

3. In approximately April 2008, Claimant contacted Mr. Tanner at employer's office in Cortez, Colorado inquiring about the availability of work with Respondent-employer. Claimant was advised by Mr. Tanner that no work was currently available. Claimant was subsequently contacted by Mr. Tanner and advised that a job was available in Questa, New Mexico. Claimant inquired as to what the pay rate was, and upon determining that the pay rate was appropriate, indicated that he would take the job. Claimant testified that he was not retained by employer as part of a union contract.

4. Claimant testified he traveled to Questa, New Mexico several days before his job was to begin and filled out an employment application with the assistance of employer, as Claimant does not read or write. Claimant testified that the employment application was filled out in Questa, New Mexico. Claimant's employment application is dated June 2, 2008, the same day Claimant submitted a urine sample at the job site in New Mexico. The employment application identifies the position applied for as "Dozers" and requests information such as skills and Claimant's employment history.

5. Respondents presented the testimony of Mr. Peterson, the employer's District Safety Manager. Mr. Peterson testified that employer performs civil construction work in a variety of states, including Colorado, although at the time of the hearing Colorado had only two current projects in Colorado. Mr. Peterson testified that Claimant had taxes taken out for New Mexico state taxes from his paycheck. Mr. Peterson testified that a contract for hire would not have arisen in this case out of the Cortez office and Claimant would have been required to submit to a drug screen upon arriving at the job site in New Mexico. Claimant's successful completion of the drug screen would have been a pre-requisite to his being hired on the job site. Mr. Peterson further testified that Claimant would have needed to complete an informal observation to ensure that Claimant was capable of operating the heavy equipment prior to being allowed to perform his

job. Mr. Peterson testified that if Claimant failed the informal observation, no position would have been offered Claimant. The ALJ finds the testimony of Mr. Peterson credible and persuasive.

6. Respondents also presented the testimony of Mr. Tanner, the manager of human resources and training for employer. Mr. Tanner's job duties include staffing positions for employer. Mr. Tanner testified that their positions would be staffed by newspaper ads, word of mouth or the following of employees who would travel to various job sites for work. Mr. Tanner testified that Claimant would periodically stop in the Cortez office and advise employer that he was available for work if employer had any openings. Mr. Tanner testified that at some point during the Spring of 2008, he spoke with Claimant and advised Claimant that work was available in Questa, New Mexico. Mr. Tanner further testified that if Claimant had requested to be reimbursed mileage for traveling from Cortez to the job site in Questa, New Mexico, Mr. Tanner would have provided Claimant with mileage forms and Claimant would have been reimbursed for mileage. Claimant testified in rebuttal that he was reimbursed mileage for his travel to the job site in Questa, New Mexico. Claimant suffered an admitted injury to his low back while employed with employer on June 12, 2008 in Questa, New Mexico. Mr. Peterson testified that this workers' compensation claim is currently being handled pursuant to the New Mexico workers' compensation act.

7. Based upon the evidence, the ALJ finds Claimant contacted employer at their offices in Cortez, Colorado regarding potential employment. After initially being advised that no employment was available, employer contacted Claimant while Claimant was in Cortez, Colorado and advised Claimant that work was available in Questa, New Mexico. Claimant was required to travel to Questa, New Mexico for the employment. Upon arriving at Questa, New Mexico, Claimant filled out an application for employment, submitted a drug screen, and was hired by employer to perform the functions of a heavy equipment operator. The ALJ finds that Claimant's contacts with employer in Cortez, Colorado were merely informative and did not create a contract of hire. Claimant was advised of the availability of work and advised where Claimant would need to travel to apply for said employment, however, no contract for hire was entered into between the parties.

8. The ALJ finds that the application for employment, completed on June 2, 2008, the same day as the drug screen, was a necessary prerequisite for Claimant to be hired by employer. The ALJ finds that the last act necessary for Claimant to enter into a contract for hire occurred in New Mexico when Claimant completed the employment application. While Claimant was paid mileage for his travel from Cortez to Questa, New Mexico, the ALJ does not find credible evidence that the arrangement for mileage reimbursement was bargained for as a part of the employment negotiations. As such, Claimant being reimbursed for his mileage after being hired by employer is insufficient to vest Colorado with jurisdiction for a workers' compensation claim arising out of a contract for hire entered into outside the State of Colorado.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Colorado jurisdiction over injuries suffered outside of the state is conferred by statute. Section 8-41-204, C.R.S. 2008 provides that Colorado has jurisdiction over out-of-state injuries if the employer was "hired or is regularly employed in this state." Whether an employee was "hired … in this state" is a contract question generally governed by the same rule as other contracts. *Denver Turck Exchnage v. Perryman*, 134 Colo. 586, 407 P.2d 805 (1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1984). The place of contracting is generally determined by the parties' intention, and is usually the place where the offer is accepted, or the last act necessary to the meeting of the minds or to complete the contract is performed. *Id.; Denver Truck Exchange v. Perryman, supra.* Despite the application of the general law of contracts to this issue, however, the court of appeals has stated that in some circumstances it is only necessary that the "fundamental elements" of a contract be present:

> [T]he determination of when and where a contract is formed requires consideration of the purpose for the determination. When that purpose is determining the application of workers' compensation law, a technical application of the 'contract of hire' requirement is not appropriate. Hence, the general rule announced in *Denver Truck Exchange* has been tempered so that a contract of hire may be deemed formed, even though not every formality attending

> commercial contractual arrangements is observed, as long as the fundamental elements of contract formation are present.

Moorhead Machinery & Boiler Co. V. Del Valle, 934 P.2d 861, 864 (Colo. App. 1996) *abrogated on other grounds Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001). In reaching this conclusion the court quoted with approval a passage from Larson's treatise stating that the realities of the employment relationship were more important in this determination that the "technicalities" of contract law, especially where the hiring practices of a particular employment warranted such treatment. *See Moorhead Machiner & Boiler Co., supra.* (quoting 1A A. Larson, *Workmen's Compensation Law* § 26.22 at 5-325 (1995) (it is necessary "[to subordinate] contract law technicalities to the reality of the [employment] relationship existing from the time the claimant [began] his journey toward the job pursuant to the overall-contract governing the way hiring is done in this particular employment").

4. As found, Claimant contacted employer's office in Cortez, Colorado inquiring about the availability of employment. Claimant was ultimately advised by employer that work was available in Questa, New Mexico. Claimant traveled to Questa, New Mexico where he filled out an employment application for employer and submitted to a drug screen and performed the necessary pre-employment testing to obtain an offer of employment. As found, the completion of the "employment application" and subsequent hiring of Claimant represent the last act necessary for the Claimant and employer to enter into an employment contract. The ALJ finds that Claimant did not enter into an employment contract until such time as he completed the employment application. Prior to that time, Claimant had merely been advised of a position available at a job site. Therefore, Claimant had not entered into an employment contract until such time as he appeared at the job site and completed the employment application on June 2, 2008, and such act took place in New Mexico. The fact that Claimant was paid mileage for his travel from Cortez, Colorado to Questa, New Mexico does not alter the court's conclusion that the last act necessary for the employment contract took place in New Mexico. As found, the credible evidence did not establish that Claimant's mileage for travel to Questa, New Mexico was specifically negotiated while Claimant was in Colorado, nor was evidence presented that Claimant was paid mileage until after he had begun employment in New Mexico.

5. Claimant also argued at hearing that Section 8-41-204, C.R.S. 2008 provides jurisdiction for out-of-state injuries involving individuals who are regularly employed in the state of Colorado with other employers, regardless of the place where the contract for hire took place with the employer in whose employment the injured worker was engaged at the time of the injury. The ALJ is not persuaded.

6. Section 8-41-204, C.R.S. 2008 has been called the extraterritorial provision of the workers' compensation act because it addresses entitlement to compensation for injuries occurring outside the state of Colorado. *Hathaway Lighting v. Industrial Claim Appeals Office*, 143 P.3d 1187 (Colo. App. 2006). This section of the Act states in pertinent part:

> If an employee who has been hired or is regularly employed in this state receives personal injuries in an accident or an occupational disease arising out of and in the course of such employment outside of this state, the employee, or such employee's dependents in case of death, shall be entitled to compensation according to the law of this state. This provision shall apply only to those injuries received by the employee within six months after leaving this state….

7. Claimant essentially argues that because in the three years prior to his injury he was employed with various employers within the state of Colorado, Colorado would retain jurisdiction over the injuries incurred out of state regardless of where the contract for hire took place. This is despite the fact that Claimant did no work for the Respondent-employer in the state of Colorado for at least 5 years prior to his injury, and the contract for hire did not occur in Colorado.

8. In construing statutes, courts must give effect to the underlying legislative intent. *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2003). To do so, courts first look to the statutory language itself, giving words and phrases their commonly accepted and understood meaning. *Id.* If the statutory language is unambiguous, there is no need to resort to interpretive rules of statutory construction. Therefore, if the courts can give effect to the ordinary meaning of the words adopted by the General Assembly, the statute should be construed as written, because it may presumed that the General Assembly meant what it clearly said. *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002).

9. The ALJ interprets "such employment" as used in Section 8-41-204, C.R.S. 2008 to refer to the employment Claimant is performing inside the state of Colorado with the Respondent-employer, not employment in general. Interpreting the statute otherwise would subject employers who have no ties to the state of Colorado to potential Colorado jurisdiction if such employers were to hire employees from Colorado and an injury occurs during the first six months of employment, regardless of where the contract for hire took place.

10. The ALJ finds that Claimant was not employed in "such employment" inside the state of Colorado with Respondents-employer prior to his injury. As found, Colorado does not have jurisdiction over Claimant's June 12, 2008 injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits is denied and dismissed.

DATED: May 27, 2009

Keith E. Mottram

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-778-351

ISSUES

The issues to be determined by this decision are as follows:

1. Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course and scope of her employment.

2. Whether medical treatment incurred by Claimant is reasonable, necessary and related to cure and relieve the effects of the industrial injury and whether the medical care was provided by an authorized treating physician designated by Respondents.

FINDINGS OF FACT

1. Claimant is employed by employer as an assistant performing a variety of tasks, including reception, residence maintenance, cleaning buildings and administrative tasks. On October 30, 2008, Claimant was cleaning a property that employer was preparing to put on the market. Claimant was carrying a vacuum cleaner from the second floor to the first floor when she developed shooting pain in her left knee. Claimant testified that the vacuum cleaner weighed twenty to twenty five (20-25) pounds. Claimant reported her injury to her co-worker who was working with her at the time, Ms. Rasmussen. Claimant and Ms. Rasmussen drove back to the office and Claimant reported her injury to employer's bookkeeper/controller, Ms. Divinny. Ms. Divinny did not make a written report of Claimant's injury. Claimant testified she did not immediately seek medical care as she thought if she gave her knee time it would get better.

2. Claimant sought treatment with Dr. Liwaang, her chiropractor, on October 31, 2008. Claimant reported to Dr. Liwaang that her left knee went out at work and that she was experiencing pain and her knee would pop out and make a clicking sensation while walking. Dr. Liwaang referred the Claimant to Dr. Huang at Rocky Mountain Orthopedics for further evaluation of the left knee.

3. Claimant was initially evaluated by Dr. Huang on November 6, 2008. Dr. Huang noted that Claimant had experienced pain in her bilateral knees for the past several years prior to the October 30, 2008 incident. Claimant reported a new onset of popping and catching in the left knee, that had been occurring with almost every step the past several days. Dr. Huang noted Claimant had left knee joint pain and instability and diagnosed Claimant with a possible medial meniscal tear or loose body in addition to bilateral patellofemoral degenerative joint disease. Dr. Huang performed x-rays of Claimant's left knee that revealed minimal arthritis in the medial and lateral compart-

ments of both knees. The x-rays also revealed moderate to severe lateral patellofemoral degenerative joint diseaswe in the right knee greater than in the left. Dr. Huang recommended a magnetic resonance image ("MRI") of the left knee to determine if a loose body or meniscal tear could be the cause of Claimant's pain.

4. Claimant underwent an MRI of the left knee on November 11, 2008. The MRI revealed (1) severe chondromalacia patellofemoral compartment; (2) chondromalacia medial femoral condyle focally over weight-bearing portion; and (3) popliteal cyst. Dr. Huang noted the MRI sowed a more acute appearing chondral flap along the medial femoral condyle. Dr. Huang further acknowledged that the MRI revealed preexisting patellofemoral chondromalacia. Dr. Huang recommended Claimant continue with non-operative treatment, but noted that Claimant would be a candidate for arthroscopic evaluation, chondroplasty and possible need for microfracture.

5. Claimant reported her injury in writing to her employer on November 14, 2008. Respondents referred Claimant for medical treatment to Dr. McLaughlin on November 17, 2008. Claimant reported to Dr. McLaughlin that she was getting a townhouse ready for final evaluation and sale and was going up and down the stairs many times and was carrying a vacuum, bending over and squatting to clean up a new carpet that had been installed and Claimant reported noticing a pop in her left knee when she was coming down the stairs. Dr. McLaughlin opined that Claimant's knee injury was consistent with the work she was doing going up and down steps, especially carrying a vacuum and doing a lot of bending and squatting. Dr. McLaughlin acknowledged that Claimant's MRI revealed degenerative findings, but noted that the flap along the medial femoral condyle appeared to be acute. Dr. McLaughlin noted that he discussed with Claimant that she should see Dr. Huang and proceed with Dr. Huang's recommendations and limited Claimant to sit down work only and requested Claimant follow up with Dr. McLaughlin postoperatively. The ALJ finds the medical report of Dr. McLaughlin credible and persuasive.

6. Claimant was referred for an IME with Dr. Raschbacher on December 2, 2008. Dr. Raschbacher noted that Claimant had preexisting chondromalacia that was non-work-related in causation, but may have become aggravated with work activity. Dr. Raschbacher noted that if surgery would be done, a chondroplasty would be appropriate, but microfracture treatment would not be appropriate for an acute flair. Dr. Raschbacher noted that the microfracture treatment would be due to the underlying preexisting non-work-related severity of the chondromalacia and should not be done as treatment from the alleged workers' compensation claim. Claimant returned to Dr. Huang on December 11, 2008. Claimant reported to Dr. Huang that her pain had gotten better with activity modification and anti-inflammatories. Dr. Huang explained to Claimant the possible surgical intervention which could be used to treat Claimant's condition, and Claimant indicated she would consider her surgical options and get back to Dr. Huang after she had made her decision. Claimant was reevaluated by Dr. McLaughlin on December 17, 2008. Dr. McLaughlin recommended Claimant proceed with the surgery suggested by Dr. Huang and noted that the surgery was within Dr. Huang's exper-

tise. Dr. McLaughlin continued Claimant on work restrictions and requested Claimant follow up with him postoperatively.

7. Claimant returned to Dr. Huang on January 29, 2009. Dr. Huang noted that he had reviewed the medical report from Dr. Raschbacher and agreed that the patellofemoral chondromalacia was likely pre-existing, however, Dr. Huang opined the nature of the medial femoral condyle chondral flap likely was not pre-existing and is the cause of Claimant's current symptoms. Dr. Huang further opined that the proposed treatment of surgical intervention consisting of medial femoral condyle chondroplasty with microfracture was a reasonable course of treatment. The ALJ finds the medical reports of Dr. Huang and Dr. McLaughlin more persuasive than those of Dr. Raschbacher.

8. Respondent referred Claimant for an IME with Dr. Zuehlsdorff on March 23, 2009. Claimant provided Dr. Zuehlsdorff with an accident history of carrying a vacuum cleaner down a flight of stairs when her left knee started to hurt in the medial area of her knee. Claimant reported to Dr. Zuehlsdorff that she had pain in both knees for the previous two years with her knees feeling creaky and achy, but never sought treatment for this condition. Dr. Zuehlsdorff diagnosed Claimant with an acute medial femoral condyle chondral flap lesion on her left knee requiring chondroplatsty with microfracture. Dr. Zuehlsdorff noted that regarding the question of causality, Claimant was walking down the stairs carrying a light vacuum when her knee suddenly started to hurt. Dr. Zuehlsdorff noted there was no twisting, slipping or hyperextenstion and Claimant was simply walking down the stairs and thus opined that her knee condition could not be causally related to her work, as the activity of walking down the stairs was not of a magnitude different from or above her activities of daily living.

9. Dr. Zuehlsdorff testified at the hearing in this matter expanding on his report. Dr. Zuehlsdorff reported that Claimant's MRI revealed severe chronic chondromalacia under the knee cap. Dr. Zuehlsdorff testified that due to the moderately severe arthritis in Claimant's knee, this area is susceptible to tear and can spontaneously tear with minimal activity. Dr. Zuehlsdorff also testified that the act of carrying a vacuum is different from lifting a vacuum and would not be considered a hazard of employment.

10. The ALJ credits the reports of Dr. Huang and Dr. McLaughlin over the report and testimony of Dr. Zuehlsdoff. The ALJ finds that the act of carrying a vacuum up and down stairs represents a special hazard of employment and contributed to Claimant's knee injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). The fact that an employee has suffered a previous disability or impairment or received compensation therefore shall not preclude compensation for a later injury or for death. Section 8-42-104(1), C.R.S. An employee's temporary total disability, temporary partial disability, or medical benefits shall not be reduced based on a previous disability. Section 8-42-104(3), C.R.S. 2008.

3. Claimant must show that the injury was sustained in the course and scope of his employment and that the injury arose out of his employment. The "arising out of" and "in the course of" employment criteria present distinct elements of compensability. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). For an injury to occur "in the course of" employment, the claimant must demonstrate that the injury occurred in the time and place limits of her employment and during an activity that had some connection with his work-related functions. *Id.* For an injury to "arise out of" employment, the claimant must show a causal connection between the employment and the injury such that the injury has its origins in the employee's work related functions and is sufficiently related to those functions to be considered a part of the employment contract. *Id.* Whether there is a sufficient "nexus" or relationship between the Claimant's employment and his injury is one of fact for resolution by the ALJ based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988)

4. Respondents correctly point out that Claimant's injury is not compensable if the injury was precipitated by a pre-existing condition brought by the claimant to the workplace. An otherwise compensable injury, however, does not cease to arise out of employment because it is partially attributable to a pre-existing physical infirmity of the employee. *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992). Rather, an injury which results from the concurrence of a pre-existing condition and a special hazard of employment is compensable. *H&H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Thus, even if the direct cause of the accident is a preexisting idiopathic disease or condition, the resulting disability is compensable if the conditions or circumstances of employment have contributed to the accident or to the injuries sustained by the employment. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). To be an employment hazard for this purpose, the employment condition must not be a ubiquitous one; it must be a special hazard not generally encountered. Notably, courts have held in the past that stairs constructed of concrete or other hard materials are common enough in parking lots, on sidewalks, in public buildings and

in homes to be ubiquitous as a matter of law. *See Gaskins v. Golden Automotive Group, L.L.C.*, W.C. No. 4-374-591 (Industrial Claim Appeals Office, August 6, 1999).

5. In this case, Claimant's employment duties on the date of her injury including climbing stairs, carrying a twenty (20) pound vacuum, and repeated bending and squatting to clean a new carpet that had been installed. As found, the ALJ credits the reports of Dr. Huang and Dr. McLaughlin insofar as the reports find that these activities led to Claimant's medial femoral chondral flap lesion necessitating surgery. The ALJ further finds that the employment activities, including carrying a vacuum weighing twenty to twenty five (20-25) pounds down a flight of stairs, represent a special hazard of employment not generally encountered and not ubiquitous in nature. The ALJ finds Claimant's injury resulted from her job duties, including repeated bending and squatting and having to carry items up and down stairs, and not just the mere act of descending the stairs. Therefore, while the stairs would be considered ubiquitous, the ALJ finds act of carrying items up and down the stairs is not ubiquitous in nature and Claimant's claim is compensable.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-42-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once Respondents have exercised their right to select the treating physician, Claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). The right to select the treating physician, however, passes to Claimant where the employer fails to designate a physician willing to treat Claimant in the first instance. *See Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Section 8-43-404(5), C.R.S. now requires the employer to provide an injured employee with a list of at least two physicians or medical providers willing to treat Claimant.

7. An employer has the obligation to designate a treating physician forthwith upon notice of the injury, or else the right of selection passes to the employee. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). If the employee obtains unauthorized medical treatment, the employer or its insurer is not required to pay for it. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 2006). An employer is deemed notified of an injury when it has "some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim. *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984) (quoting 3 A. Larson, *Workman's Compensation Law* § 78.31(a) at 15-105 (1983)).

8. In this case, Claimant reported her injury on the date that it occurred to her co-worker and the controller for employer, Ms. Divinny. Claimant also testified that she did not immediately seek medical treatment as she did not believe her injury would require treatment. Therefore, as Claimant did not believe her injury would require treat-

ment, the ALJ finds that a reasonably conscientious manager would not believe the injury would require treatment at that time either. Claimant subsequently reported her injury in writing to her employer on November 14, 2008, and the insurer referred the Claimant to Dr. McLaughlin for treatment. Dr. McLaughlin subsequently referred Claimant back to Dr. Huang, however, the ALJ finds the treatment from Dr. Huang prior to November 17, 2008 was not authorized by Respondents.

9. The ALJ further finds that the surgery proposed by Dr. Huang and Dr. McLaughlin is reasonable, necessary and a compensable consequence of Claimant's compensable October 30, 2008 injury.

ORDER

It is therefore ordered that:

1. Respondents are to pay for Claimant's medical treatment from Dr. Huang and Dr. McLaughlin incurred after November 14, 2008.

2. Respondents are to pay for the surgery proposed by Dr. Huang.

The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

DATED: May 27, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-778-444

ISSUES

The issues for determination are compensability, medical benefits, and temporary total disability benefits. The parties stipulated to an average weekly wage of $551.36.

FINDINGS OF FACT

1. Claimant has been employed with Employer from May 2008 through the present. Claimant has not held any other employment during this time.

2. Claimant works as a Clerk 1 for Employer. Her primary job function is to process personnel files by labeling and date stamping the files. The files arrive at

Claimant in 11 inch by 14 inch boxes containing 40-45 files. The boxes filled with files weigh approximately 30 pounds. The boxes are stacked on top of each other six boxes high.

3. To perform her job duties, Claimant would lift an individual box from the stack and place the box on the floor. Claimant would then bend over to pick up the box and turn around to place the box on a three to four foot high table. Claimant would remove the files, process the files, and place the files back into the box. Once full, Claimant would lift the box from the table and place it on the floor to be taken away by a co-worker. Claimant processed between eight and fifteen boxes of files per day.

4. Claimant would have to retrieve a missing file from a different room approximately twice per week. To accomplish this task, Claimant would go to the other room and remove the appropriate box from a shelf and place the box on the floor. These boxes are the same size as the boxes described above. Once the missing file is retrieved, Claimant would lift the box and place it back on the shelf.

5. Claimant worked from 7:00 a.m. to 3:30 p.m. during a typical shift for Employer. During this shift, Claimant was allowed two fifteen-minute breaks and a thirty-minute lunch break.

6. On November 18, 2008, Claimant arrived at work at 7:00 a.m. She performed her regular job duties and processed between ten and fifteen boxes of files. Claimant left work at approximately 3:30 p.m. and drove to her home. She watched television and tended to her animals until approximately 6:00 p.m. when she drove to Buffalo Wild Wings to play trivia and eat dinner.

7. At Buffalo Wild Wings, Claimant sat at the bar in a bar chair approximately four feet high with a chair back. Claimant initially noticed pain in her left shoulder and neck when she turned the chair and pulled it toward her.

8. Prior to the November 18, 2008, injury, Claimant had been to Buffalo Wild Wings once a week for approximately two months. She had sat at the bar in a similar chair and had never experienced any pain getting into or out of the bar chair.

9. After leaving Buffalo Wild Wings, Claimant drove home and took a Skelaxin for her pain. Claimant went to bed at about 8:30 p.m. but was unable to sleep through the night due to pain in her left shoulder and neck.

10. On November 19, 2008, Claimant awoke at approximately 5:00 a.m. and arrived at Employer at 7:00 a.m. Claimant was unable to lift the boxes. She reported the injury to Griffin, her supervisor. Claimant was unable to complete her shift.

11. Griffin testified that Claimant had told her that she hurt herself at home.

12. After leaving Employer on November 19, 2008, Claimant drove home, took a Skelaxin, and fell asleep. At approximately 6:30 p.m. or 7:00 p.m., Claimant awoke from her nap and called Kinnaman, another supervisor, to let him know that she would not be able to make it in to work the following day because of her injury. Kinnaman did not answer the phone call so Claimant left him a voicemail message. Claimant went to bed at approximately 8:00 p.m., but again was unable to sleep through the night due to the pain in her left shoulder and neck.

13. On November 20, 2008, at approximately 2:30 p.m., Claimant went to see Dr. Karen Larsen, her personal doctor, who prescribed Skelaxin. Following her doctor's appointment, Claimant drove home, took a Skelaxin and went to bed for the night at approximately 5:00 p.m.

14. On November 21, 2008, Claimant awoke between 7:00 a.m. and 7:30 a.m. and arrived at Employer between 9:00 a.m. and 11:00 a.m. While at Employer, Claimant spoke with Gilman, who completed a Employer Network Incident/Accident Report, which was signed by Stampley and dated "11-18-08". In the "General Description" of the accident, Gilman wrote, "[Claimant] was moving boxes at work during her shift as a receiving clerk and strained her neck and left shoulder… [She] did not notice any pain until after she left work on 11/18/08 and was not able to attend work 11/19/08. She came in today to file an accident report and to get information about WC doctors that will be able to examine her. She said that she has pain in her neck and left shoulder and has tingling down her left arm and in her left hand." Claimant was directed to Concentra for evaluation and treatment.

15. On November 21, 2008, Claimant went to Concentra where she was evaluated by Dr. Steve Danahey. Dr. Danahey noted Claimant "indicates that she picks up and lifts boxes. She reports that she had a gradual onset of discomfort Tuesday evening, 11/18/2008. She reports that there was no one single instance when she was hurt, but that she picked up and lifted boxes of files as a part of her normal job duties." Dr. Danahey diagnosed cervical sprain, left upper back sprain and strain, and left shoulder sprain and strain and prescribed physical therapy and chiropractic care. Dr. Danahey placed Claimant on a "no activity work status."

16. On November 25, 2008, Stampley completed an Employer's First Report of Injury. The description of the injury is listed as "pain in neck/lt shldr lifted boxes EE was moving boxes at work, when she strained her neck & left shoulder. EE did not notice any pain until after she left work for the day." The box asking whether the injury occurred on premises is checked "Yes."

17. On November 26, 2008, Dr. Danahey prescribed an MRI of the cervical spine and stated that Claimant "will remain on a no activity job status." Later that day, Claimant had the MRI of her cervical spine at Rocky Mountain Radiologists.

18. On December 1, 2008, Dr. Danahey again recommended that Claimant "will remain on a no-activity work status" and referred her to Dr. John Aschberger.

19. On December 15, 2008, Dr. Aschberger evaluated Claimant and noted "[s]he indicates that she was lifting boxes at work of variable weight with progressive increase of symptoms in the neck and then significant increase in symptomatology later that day." Dr. Aschberger diagnosed a cervical strain, prescribed electrodiagnostic testing, and recommended "no overhead motion, no repetitive cervical motion, no reaching with the left arm, and no lifting with the left arm. Position breaks should be allowed as needed."

20. On December 24, 2008, Claimant completed electrodiagnostic testing and followed-up with Dr. Aschberger who noted, "I expect ability to return to work within a sedentary capacity shortly."

21. On December 30, 2008, Dr. Danahey recommended that Claimant continue with physical therapy and assigned work restrictions of no lifting over five pounds, no pushing and/or pulling over ten pounds, and no reaching above shoulders.

22. On January 5, 2009, Claimant returned to work for Employer in a modified capacity.

23. On January 13, 2009, Dr. Danahey recommended that Claimant continue with physical therapy and assigned work restrictions of no lifting over ten pounds, no pushing and/or pulling over fifteen pounds and no reaching above shoulders.

24. On February 2, 2009, Dr. Joel Boulder released Claimant from care.

25. Prior to November 18, 2008, Claimant had not suffered an injury to her left shoulder or neck and had not experienced pain in her left shoulder or neck. Claimant had not received medical treatment for her left shoulder or neck prior to November 20, 2008. Claimant does not participate in significant physical activities outside of work.

26. Claimant's condition prevented her from performing her regular job duties for Employer from November 21, 2008, through January 5, 2009, a time period of 45 days or 6.43 weeks. Claimant had work restrictions during this time period.

27. Claimant has received a bill for the November 26, 2008, MRI. She did not pay this bill.

CONCLUSIONS OF LAW

This decision contains specific findings of fact, conclusions of law, and an order. In this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record and resolved conflicts in the evidence, in accordance with Section 8-43-215, C.R.S. See *Davison v. Indus. Claim Appeals Office*, 84 P. 3d 1023 (Colo. 2004); *Kroupa v. Indus. Claim Appeals Office*, 53 P. 3d 1192 (Colo.App. 2002); *Wal-Mart Stores, Inc. v. Industrial Commission*, 989 P. 2d 251 (Colo.App. 1999). This decision

does not specifically address every item in the record; instead, incredible or unpersuasive testimony, evidence, or arguable inferences have been implicitly rejected or found unpersuasive. *Magnetic Engineering, inc. v. Indus. Appeals Office*, 5 P .3d 385 (Colo.App. 2000).

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. See *City of Boulder v. Streeb*, 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P. 3d 844 (Colo.App. 2000); *Lutz v. Industrial Claim Appeals Office*, 24 P. 3d 29 (Colo.App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A*., 104P. 3d 273 (Colo.App. 2004); *Hoster v. Weld County Bi-Products, Inc.*, W.C. No. 4-483-341 (ICAO, March 20, 2002).

In a Workers' Compensation claim, the burden of proof is upon the claimant to establish by a preponderance of the evidence that she sustained an accident arising out of and in the course and scope of her employment. *City of Boulder v. Streeb*, 706 P. 2d 786 (S. Ct. 1985). Occupational diseases are injuries that are not due to an accident but instead result from the conditions of employment over a period of time. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo.App. 1993).

The issue of compensability comes down to a determination of credibility of Claimant's account of the mechanism of injury. Respondents theorize that Claimant did not suffer a work-related injury in part based on a conversation recounted by Griffin and that the injury actually occurred while Claimant got into a bar chair at Buffalo Wild Wings. There is no dispute that Claimant suffered an injury to her left shoulder and neck, as is clearly outlined in the medical records. Claimant testified that her injury was the result of repetitively lifting boxes weighing approximately 30 pounds each.

On November 18, 2008, Claimant testified that she worked from 7:00 a.m. until 2:30 p.m. and performed her typical job duties. She did not notice any pain in her left shoulder or her neck that day until she attempted to get into a four-foot high bar chair at Buffalo Wild Wings. Claimant testified that she had to turn the chair awkwardly and pull it toward her to get into the chair. It was at this point that the Claimant noticed pain in her left shoulder and neck. Claimant testified that she did not injure herself performing this maneuver but rather noticed the pain for the first time due to the awkward movement. Claimant went home and took a Skelaxin for her pain and went to bed. When she woke up on November 19, 2008, she went to work but was able to perform her job duties because she could not lift the boxes.

Claimant testified that she spoke with Griffin and stated that she needed to go home because she had hurt herself. Griffin testified that she remembers Claimant saying something to the effect that she had hurt herself at home. Claimant denies saying

this. It is certainly possible that Griffin could have mistaken what Claimant had reported to her regarding the injury. Claimant's testimonial account of the mechanism of injury is supported by several documented accounts all completed within days of the date of injury. In Employer's "Incident/Accident Report" Gilman documents the mechanism of injury as moving boxes at work and that Claimant did not notice any pain until after she left work. This report was completed on November 21, 2008, and is consistent with Claimant's testimony as to the mechanism of injury. Claimant provided a similar account as to the mechanism of injury to Dr. Danahey later that day. Claimant reported that she picks up and lifts boxes at work and that she had a gradual onset of discomfort in the evening. Finally, Employer's First Report of Injury, completed by Stampley on November 25, 2008, describes the injury as having occurred when moving boxes at work, and that pain was not noticed until after Claimant left work. Stampley also indicated in the First Report of Injury that the injury occurred at work.

When reviewing the totality of the evidence, the consistent description of the injury as reported in the Incident/Accident Report, the Employer's First Report of Injury, the description of the mechanism of injury by Drs. Danahey Aschberger, Claimant's testimony, and considering Claimant does not participate in physical activities outside of work, Claimant has proven by a preponderance of the evidence that her injury was the result of repetitive lifting on November 18, 2008.

The insurer is liable for medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. The injured worker bears the burden to prove the causal connection between a particular treatment and the industrial injury. Section 8-42-101(1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo.App. 1997). An injured worker must prove that medical treatment is reasonably necessary to treat the industrial injury. *See Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

Following her injury, Claimant was directed to Concentra for evaluation and treatment. Claimant was initially evaluated by Dr. Danahey and prescribed an MRI and physical therapy. Dr. Danahey eventually referred the Claimant to Dr. Aschberger for additional treatment. Dr. Aschberger prescribed electrodiagnostic testing and additional physical therapy. On February 2, 2009, Dr. Joel Boulder released Claimant from care. Insurer is liable for all treatment described above, including theMRI from Rocky Mountain Radiologists.

Liability for medical care is limited to those amounts established by the Division of Workers' Compensation fee schedule. Section 8-42-101(3), C.R.S. No authorized medical provider may seek to recover costs or fees for treatment of this injury from Claimant. Section 8-42-101(4), C.R.S.

To establish entitlement to temporary disability benefits, an injured worker must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss that, to some degree, is the result of the industrial disability. Section 8-42-103(1), C.R.S. (2006); *PDM Molding, Inc. v. Stanberg*, 898 P .2d 542 (Colo. 1995).

Claimant has met her burden of proof regarding temporary total disability benefits. On November 21, 2008, Dr. Danahey took Claimant off work. On January 5, 2009, Claimant returned to work for Employer in a modified capacity. From November 21, 2008, through January 5, 2009, Claimant was unable to perform her regular employment.

Per stipulation of the parties, Claimant's average weekly wage is $551.36. Claimant's temporary total disability rate is $367.57. Claimant is entitled to temporary total disability benefits from November 21, 2008, through January 5, 2009 (45 days or 6.43 weeks) at the rate of $367.57 per week.

Insurer is liable for interest at the rate of eight percent per annum on all benefits not paid when due. Section 8-43-410, C.R.S.

ORDER

It is therefore ordered that:

1. Insurer shall pay for the medical treatment Claimant has received from authorized providers that is reasonably needed to cure and relieve Claimant from the effects of the compensable injury.
2. Insurer shall pay Claimant temporary total disability benefits from November 21, 2008, through January 5, 2009. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
3. Matters not determined herein are reserved for future determination.

DATED: *May 27, 2009*

Bruce C. Friend, ALJ
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-779-416

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 21, 2009, in Denver, Colorado. The hearing was

digitally recorded (reference: 5/21/09, Courtroom 3, beginning at 8:30 AM, and ending at 12:20 PM).

At the conclusion of the hearing, the ALJ referred preparation of a proposed decision to Claimant's counsel (to be submitted electronically), giving Respondents 3 working days within which to file electronic objections. The proposed decision was filed on May 27, 2009. Objections concerning two technical matters were filed on May 28, 2009. The objections are well taken. After a consideration of the proposal and the objections thereto, the ALJ has modified the proposal and, as modified, hereby issues the following decision.

ISSUE

The sole contested issue to be determined by this decision concerns compensability.

STIPULATIONS

At the commencement of the hearing, if the claim is determined to be compensable, the parties stipulated: (1) the average weekly wage (AWW) is $262.85; (2) the Claimant was temporarily and partially disabled from October 10, 2008 to May 5, 2009; and, (3) all medical treatment, including treatment by Exempla Good Samaritan Medical Center; Concentra Medical Center, John Sacha, M.D., John Aschberger, M.D., and Advanced Medical Imaging is authorized, reasonably necessary and causally related medical treatment. The ALJ accepts these stipulations and so finds as fact.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. Claimant started working at for the Employer about one and a half years ago in the customer merchandise pickup department.

2. In the merchandise pick up department, Claimant's job responsibilities included picking up orders for the customers and delivering the orders to their cars.

3. On October 10, 2008, while working for the Employer, the Claimant bent down to pick up an air compressor, weighing approximately 40-45 pounds, and while lifting it to put it in a customers car, he felt a pop and pain in his back.

4. On October 10, 2008, Claimant reported to Pria Vatilingham, his manager, that he hurt his back while lifting an air compressor.

5. Claimant continued to work that day and that night he continued to experience pain in his back and down his right leg and he had problems sleeping.

6. Claimant continued to work and then on December 11, 2008 he met with Pria Vatilingham, and Luanne Fabrizio, his supervisors, and they completed an accident report and referred the Claimant to Exempla Good Samaritan Medical Center for medical treatment.

7. On December 12, 2008, the Claimant saw Julie K. Seaman, M.D., at Exempla Samaritan Medical Center where Dr. Seaman notes "On October 10, 2008, he was lifting another heavy object at work when he had feelings of a knuckle cracking in his low back. He has had low back pain with occasional radiation in his right leg since that time," and the doctor recommended Ibuprofen, Tylenol, and an x-ray.

8. On December12, 2008 Dr. Seaman recommended restrictions of occasional lifting/carrying 10 pounds or less; never pushing/pulling; occasional bending, squatting, kneeling; and never twisting/turning.

9. On the same date, the lumbar spine x-ray impressions were: Grade 1 Degenerative Anterolisthesis L4 and L5, moderate disc narrowing, posterior calcified disc bulge and facet arthorosis suggesting probable spinal stenosis at this level. Some facet degenerative changes, mild osteophytic spurring of the vertebral bodies predominantly lower lumbar spine.

10. On December 15, 2008, Physician Assistant (PA), Richard Shouse, notes "Patient is a 49 year old male employee of [Employer] who complains about his back which was injured on 10/10/08 2:00 p.m," and "Patient states: pickup a air comp. and felt a pop."

11. On the same date, Shouse notes in the lumbar "Tenderness of the mid line L-spine. Antalgic gait," and recommends Ibuprofen, physical therapy and no lifting over 10 pounds. He notes "Causality determined to be greater than 50% given patient mechanism of injury and present complaint."

12. On December 18, 2008, Gregory Homblin, Physical Therapist (PT) notes "Patient reports he was lifting air compressor. Patient reports he felt a pop in his lower back on the right side. Patient is having lower back pain in the right side"and on objective notes "Increase muscle tone notes with palpation of the lumbar paraspinals with tenderness to palpation and soft tissue restrictions noted."

13. On December 29, 2008, Shouse notes "Tenderness of the midline L-Spine" and to continue with medications and "no lifting over 25 pounds."

14. On January 19, 2009, Shouse notes "Tenderness on the mid line L-spine" and "mild numbness to the front of right leg" and referred him for an MRI and a physiatrist.

15. On January 26, 2009, the MRI (magnetic resonance imaging) impression was severe bilateral L4-L5 facet arthorpathy resulting in grade 1 anterolisthesis severe which along with diffuse disc bulging results in severe central canal stenosis and compression of the exiting right L4 nerve root; multi level additional mild diffuse disc bulging, bilateral facet arthropathy and neural foraminal narrowing.

16. On January 28, 2009, John Aschberger, M.D., notes "He was picking up an air compressor and describes a lift and twist-type motion when he felt a pop in the back with pain in the right low back and radiation of pain to the right leg," and recommended anti-inflammatories and "no lifting greater than 15 pounds, no lumbar extension and no bending or twisting."

17. On February 9, 2009, Richard Shouse notes "Radiation to the right leg, tender with sitting and bending," he needs to continue with the medications and no lifting over 15 pounds.

18. On February 12, 2009, John Sacha, M.D., performed L5 and S1 transforaminal epidural injections.

19. On March 9, 2009, Shouse notes. "Tenderness of the midline L-Spine. Fingertips to just below knees," and "no lifting over 15 pounds."

20. On March 26, 2009, Dr. Sacha performed right L5 transforaminal epidural injections/spinal nerve block.

21. On April 7, 2009, John S. Hughes, M.D., who performed Independent Medical Examinations (IMEs) of the Claimant on September 21, 2006 and April 7, 2009, noted on April 7, 2009 that Claimant sustained an injury on October 10, 2008 and on physical exam he noted diminishment of the right patellar reflexes (generally L4 nerve root) compared to the left, and also diminishment of the right Achilles reflexes (generally S1) compared to the left as well. He noted this was an exertional event and in my opinion, this was sufficient in terms of energy level to have aggravated the lumbar spine condition that I describe in my report of September 21, 2006. He noted progression of right L4 radiculopathy and appearance of new findings consistent with a right SI radiculopathy. He recommended and EMG and nerve conduction studies.

22. On May 5, 2009, Dr. Aschberger notes on "10/10/08 Claimant was picking up an air compressor with a lift and twist type motion" and placed claimant at maximum medical improvement (MMI) and gave him a 17% whole person rating.

23. Claimant has proven, by a preponderance of the evidence that he sustained a compensable aggravation of his pre-existing back condition on October 10, 2008, arising out of the course and scope of his employment for the Employer, when he was loading an air compressor into a customer's vehicle.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

a. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. Sections 8-43-201 and 8-43-210, C.R.S. (2008). *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office,* 24 P. 3d 29 (Colo. App. 2000). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, Claimant has sustained his burden with respect to compensability.

b. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. (2008). The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. Section 8-41-301(1)(c), C.R.S. (2008). *See Merriman v. Industrial Commission,* 120 Colo. 400, 210 P.2d 448 (1949); *National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). *Also see* Section 8-41-301(1)(c), C.R.S. (2008); *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Industrial Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, Claimant sustained a compensable aggravation of his pre-existing back condition on October 10, 2008, while loading an air compressor into a customer's vehicle during the course and scope of his employment for the Employer.

c. Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of a work-related injury. Section 8-42-101(1) (a), C.R.S. (2008). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work related injury and the condition for which benefits are sought. *See*, *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether a claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *See*, *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). As found, Claimant has established a causal relationship between her work-related injury and the condition for which benefits were sought. As stipulated and found, all of the Claimant's medical care and treatment at Exempla Good

Samaritan Medical Center, Advanced Medical Imaging, by Dr. Aschberger and By Dr. Sacha, was authorized, reasonably necessary and causally related to the compensable injury of October 10, 2008.

d. As stipulated and found, Claimant's AWW is $262.85, and he was temporarily and partially disabled from October 10, 2008 through May 5, 2009.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the October 10, 2008 injury, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant temporary partial disability benefits, based on 2/3rds of the average weekly wage of $262.85, from October 10, 2008 to May 5, 2009, both dates inclusive.

C. Any and all claims for temporary disability benefits from May 6, 2009 through May 21, 2009 are hereby denied and dismissed.

D. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of May 2009.

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-779-747

ISSUES

The issues for hearing included whether Claimant suffered a new injury and/or a substantial permanent aggravation of her occupational disease after October 26, 2007. The parties stipulated prior to the hearing that Insurer 1 provided insurance coverage for employer for the period of employment up to October 26, 2007. The parties further

stipulated that Insurer 2 provided insurance coverage for the employer for Claimant's period of employment beginning October 26, 2007.

FINDINGS OF FACT

1. Claimant is employed as a registered dental hygenist with employer. Claimant began working for employer in 1992. Claimant's primary job duties include directing patient care, performing diagnostic x-rays, peridental therapy, sterilization duties and office paper work. In the course of performing her duties, Claimant will lean the patient back in a dental chair parallel to the floor while Claimant is seated, leaning over the patient. Claimant will reach for the instruments that are located to her right side. Claimant performs this work in a clinical posture for 40 to 45 minutes per hour for seven clinical hours per day. The clinical hour will consist of 40 to 45 minutes performing the above mentioned repetitive activities with her hands, followed by 15-20 minutes of standing. Claimant's current schedule involves Claimant working Monday, Tuesday, Wednesday and every other Saturday.

2. Claimant suffered an occupational disease while employed with employer with a date of onset of June 15, 2005. Claimant sought medical treatment with Dr. Weber on June 30, 2005. Claimant reported to Dr. Weber that she had persistent pain in the neck, mid-area and reduction in certain range of motion movements. Dr. Weber diagnosed Claimant as having chronic cervical strain and referred the Claimant for physical therapy. Claimant returned to Dr. Weber on September 23, 2005 with continued complaints with left sided deltoid and trapezius pain that sometimes radiated into Claimant's neck. Claimant reported taking ibuprofen while she worked, while rarely needing it when she was off. Claimant reported most of her discomfort to be associated with her work activities. Dr. Weber recommended 10 acupuncture visits with continued home exercise. Despite Claimant's continued complaints, Dr. Weber continued Claimant working without restrictions.

3. Claimant returned to Dr. Weber on November 11, 2005 with reports of some relief with acupuncture. Dr. Weber noted Claimant had degenerative disk disease at the C5-6 level with diminished range of motion. Dr. Weber continued Claimant with 15 additional acupuncture visits. Claimant was next evaluated by Dr. Weber on January 17, 2006. Claimant reported a migraine trigger associated with her neck tension. Claimant reported significant relief with acupuncture once per week. Dr. Weber recommended an interim job site analysis to determine if some ergonomic suggestions may help with Claimant's condition. Claimant returned to Dr. Weber on February 23, 2006. Dr. Weber noted that the ergonomic specialist evaluated her job site and made a few helpful suggestions. Dr. Weber prescribed a topical pain medication as Claimant expressed some concerns with continuing to take ibuprofen orally.

4. Claimant was re-evaluated by Dr. Weber on April 7, 2006. Dr. Weber noted that the topical pain medication left Claimant with welts. Dr. Weber recommended additional acupuncture and massage as these seemed to be most helpful for Claimant. Dr. Weber provided a prescription for a TENS unit and noted Claimant was

approaching maximum medical improvement ("MMI"). Claimant was next evaluated by Dr. Weber on June 22, 2006. Claimant reported that the TENS unit helped her more than the acupuncture. Dr. Weber noted that Claimant was approaching MMI and could likely need to continue being evaluated a couple of times per year as long as she continues to work as a dental hygienist.

5. Claimant returned to Dr. Weber on July 20, 2006 with reports of doing a twist while cleaning a patient's teeth on July 7, 2006, that caused immediate pain in her neck and a click, with decreased range of motion for three (3) days. Claimant had been pre-authorized for acupuncture, but had not yet had any treatments. Dr. Weber prescribed Maxalt and instructed Claimant to follow up in three to four (3-4) weeks. Claimant was next evaluated by D. Weber on August 11, 2006 with continued complaints of an increased flare after the July 7 incident. Claimant again reported doing better with the TENS unit than with the acupuncture and Dr. Weber noted Claimant had normal range of motion of the head, neck, shoulders and chest without palpable tenderness. Dr. Weber opined that Claimant was at MMI with no impairment based on a loss of range of motion. Dr. Weber recommended Claimant continue with maintenance care including muscle relaxants, anti-inflammatories TENS supplies and quarterly medical visits.

6. Claimant continued receiving treatment pursuant to the maintenance recommendations of Dr. Weber. Claimant was evaluated by Dr. Weber on November 3, 2006 and March 23, 2007 as maintenance visits did not report any significant changes on either occasion. Claimant returned to Dr. Weber on June 28, 2007 and reported a recent flare up of her symptoms with an inciting event of carrying a lap top computer through security. Claimant's symptoms included pain radiating down to the periscapular area with a few days of limited range of motion. Dr. Weber recommended a brief course of physical therapy to maintain Claimant's functionality and refilled her Tramadol prescription.

7. Claimant returned to Dr. Weber on August 31, 2007 with reports of increased migraine headaches. Claimant continued to report improvement with the use of the e-stim unit (TENS) and Dr. Weber provided Claimant with another course of acupuncture. Claimant returned to Dr. Weber on December 13, 2007 with continued complaints of migraine headaches. Claimant reported to Dr. Weber that the recent migraines had been associated with flares of her scapulothoracic sprain and neck pain. Dr. Weber noted Claimant had a lot of tense musculature in the deltoid bilaterally and chest asymmetry. Dr. Weber started Claimant on a new medication, Amitryptyline, for her headaches and requested Claimant finish her preauthorized acupuncture.

8. Claimant again returned to Dr. Weber on February 21, 2006 and reported that her migraines had improved with the Cymbalta prescription and acupuncture. Dr. Weber noted that Claimant only needed one dose of Maxalt after a bad flare occurred from August through January. Dr. Weber continued Claimant on the Tramadol and Cymbalta. The ALJ finds the reports of Dr. Weber credible insofar as the reports docu-

ment a new symptom of increased migraine headaches beginning in August, 2006 associated with Claimant's scapulothoracic sprain and neck pain.

9. Claimant returned to Dr. Weber on May 14, 2008 with reports of a recent flare of her scapulothoracic sprain and a knot developing into the deltoid area on her right side. Dr. Weber noted that Claimant had been working without restrictions and contemplated whether the benefits of Claimant's medications and acupuncture had leveled out with the effects of Claimant's medications becoming more tolerable. Dr. Weber recommended Claimant complete a course of six visits for neuromuscular massage and instructed Claimant to return in six to eight (6-8) weeks.

10. Claimant returned to Dr. Weber on June 12, 2008. Dr. Weber noted that Claimant had been under care for a work related chronic scapulothoracic sprain since June 15, 2005 with pretty routine maintenance treatment. Dr. Weber noted that the employer had changed insurance carriers and reported that Claimant's condition was an aggravation of a pre-existing condition. Dr. Weber noted that neuromuscular massage had been very helpful. On exam, Dr. Weber reported decreased range of motion along with a trigger point with swelling and spasm. Dr. Weber recommended Claimant complete the neuromuscular massage and continued Claimant on her medications. Dr. Weber also issued a narrative letter addressed "To Whom It May Concern" on June 12, 2008 that documented Claimant's flare of her muscle spasm tension and headaches on May 8, 2008. Dr. Weber noted Claimant was on no increased medication above her usual use and remained fully functional with restrictions in her job. Claimant again returned to Dr. Weber on July 16, 2008 and reported that Claimant's continued work without restrictions seemed to aggravate her neck giving her migraines. Dr. Weber noted Claimant's neck range of motion was slightly diminished, very consistent with her impairment rating report. Dr. Weber further noted that Claimant's most recent flare seemed to be resolved.

11. Claimant was evaluated by Dr. Weber on August 27, 2008. Claimant reported to Dr. Weber that she had signed a two year contract to continue to work for employer, no more than 30 hours per week. Dr. Weber opined that Claimant's complaints were work-related, "especially with her continued work which is flaring the symptoms, certainly temporally." Dr. Weber referred the Claimant to Dr. Willner for consultation regarding her headaches and to Dr. Isser-Sax for her neck complaints.

12. Claimant was evaluated by Dr. Isser-Sax on October 2, 2008 with reports of stabbing pain with numbness in the parascapular region and upper shoulders with some radiation into the right upper arm. Dr. Isser-Sax noted that Claimant's symptoms began initially in 2005 with an exacerbation in October 2007. Dr. Isser-Sax opined that Claimant's pain was multi-factorial in nature with a component of cervical facet joint pain. Dr. Isser-Sax recommended diagnostic cervical facet joint nerve blocks. When Claimant returned to Dr. Weber on November 13, 2008, Dr. Weber agreed with the course of action recommended by Dr. Isser-Sax and provided Claimant with temporary restrictions for the first time since placing Claimant at MMI.

13. Claimant was referred by Insurer 2 to Dr. Silva for an Independent Medical Examination ("IME") on October 16, 2008. Dr. Silva noted that Claimant continued to work for Employer, but had decreased her hours from 30-35 per week to 30 per week, including no work on more than three (3) consecutive days. Dr. Silva diagnosed Claimant as having (A) cervical axial and myofascial pain syndrome with associated cervicogenic headaches/migraines; and (B) upper thoracic/scapular myofascial pain syndrome related to the work-related injury of June 30, 2005 (sic). Dr. Silva also having (A) cervical axial and myofascial pain syndrome with associated cervicogenic headaches/ migraines; (B) occipital neuralgia, right greater than left; (C) x-ray evidence of C6 moderate degenerative disc disease; and (D) probably cervical facet syndrome. In response to questions posed by Insurer 2, Dr. Silva opined that Claimant's current symptoms and condition would be considered a natural progression of the June 2005 work injury as Claimant had remained employed with her employer performing the same functions of her employment and had not experienced a new injurious event to account for her symptoms.

14. In response to an inquiry from Claimant's attorney, Dr. Weber issued a narrative on January 12, 2009 that opined Claimant did not sustain a new injury in October 2007. Dr. Weber opined that in the summer of 2007 Claimant began having worsening of her headaches that were related to myofascial tension from her chronic work-related injury of June 2005. Dr. Weber explained that the information provided by Claimant involved a new date of injury simply due to the transition of insurance companies by her employer. Dr. Weber further noted that Claimant's increasing symptoms were noted on June 28, 2007 and have continued, leading to a self-imposed reduction of hours at work. Dr. Weber agreed with Dr. Silva's IME report with the exception that Dr. Silva noted a "work-related injury of 10/26/07" as there was no injury in October 2007. Dr. Weber noted that Claimant suffers from an occupational disease and her symptoms are temporally related to working hours, and working a longer shifts leads to increasing symptoms. The ALJ finds Dr. Weber's opinions persuasive.

15. Claimant continued to follow up with Dr. Weber on January 28, 2009 with consistent reports of her symptoms. Dr. Weber recommended Claimant consult with Dr. Isser-Sax regarding possible facet joint injections and referred the Claimant for neuromuscular work.

16. Claimant testified that as a result of her work injury, she began reducing her hours at work, beginning in 2007. According to Claimant's employment records, Claimant was short hours in February, March, June, August, September, and December. Claimant finished 2007 approximately 14 hours short of her contractual obligations. Claimant negotiated a new contract in March, 2008 which required Claimant to work less hours. Claimant testified she negotiated less hours into her new contract due to the fact that she was unable to meet the prior contractual obligations as a result of her work injury. The evidence also indicates that Claimant continued to work less hours, even while under her new contract of employment. The ALJ finds the testimony of Claimant credible.

17. The ALJ finds that Claimant began to suffer an increase in her symptoms as a result of the June 15, 2005 occupational disease beginning in June 2007. Based on the evidence, the worsening of Claimant's symptoms continued through the Summer of 2007. The ALJ finds that Claimant's worsening of her symptoms was the natural progression of her June 15, 2005 occupational disease. The ALJ finds that Claimant did not suffer a substantial and permanent aggravation of her occupational disease after October 26, 2007.

CONCLUSIONS OF LAW

1. A claimant sustains an occupational disease when the injury is the incident of work, or a result of exposure occasioned by the nature of the work and does not come from a hazard to which the worker would have been equally exposed outside of the employment. Section 8-40-201(14), C.R.S. 2007. Pursuant to Section 8-41-304(1), C.R.S., where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease and suffered a substantial and permanent aggravation thereof and the insurance carrier, if any, on the risk when such employee was last so exposed under such employer shall alone be liable therefor, without right to contribution from any prior employer or insurance carrier.

2. Section 8-41-304(1) does not govern the determination of liability for medical benefits in a claim based upon an occupational disease, because in the context of this statute, the term "compensation" does not include "medical benefits." *Royal Globe Insurance Co. v. Collins*, 723 P.2d 731 (Colo. 1986). Rather, the insurer on the risk at the time the medical expenses are incurred is liable for those medical benefits. *Id.* The insurer "on the risk" when medical expenses are "incurred" is the carrier which insured the employer whose conditions of employment were the proximate cause of the need for treatment. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001).

3. As found, Claimant's current need for medical treatment is the result of her June 15, 2005 occupational disease. Claimant's need for treatment was exacerbated by her employment duties during June through August of 2007. The ALJ finds that there is no substantial and permanent aggravation of Claimant's medical condition after October 26, 2007. The ALJ credits the opinion of Dr. Weber and Dr. Silva and finds that Claimant's current need for medical treatment is the direct result of the natural progression of Claimant's June 2005 occupational disease.

ORDER

It is therefore ordered that:

1. Insurer 1 shall pay for the reasonable, necessary and related medical treatment provided by authorized providers to treat Claimant's occupational disease.

2. Claimant's claim again Insurer 2 is hereby denied and dismissed.

The Insurer 1 shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

DATED: May 15, 2009

Keith E. Mottram
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-780-027

ISSUES

¬ Did the claimant prove by a preponderance of the evidence that he sustained neck and low back injuries proximately caused by the performance of service arising out of and in the course of his employment?

¬ Did the claimant prove by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment as a result of the alleged injuries?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

The claimant alleges that on November 30, 2008, he sustained injuries to his back and neck while shoveling dirt pursuant to his supervisor's instruction.

The claimant testified that he was hired on approximately November 18, 2008, to work as a machine operator for the employer's heavy equipment business. On November 30, 2008, the claimant was assigned to assist a crane operator at a job site in Wyoming. This was a new crane and the claimant was directed to remain near the crane operator and to provide assistance when the crane was moved. The claimant stated that towards the end of the day his supervisor, Mr. Russ Brown, directed him to use a shovel to move frozen dirt. The claimant stated that he shoveled dirt for approximately 15 minutes when he experienced severe pain in his back. The claimant recalled that the sudden onset of pain caused him to fall and during this event he injured his neck.

The claimant's immediate supervisor, Mr. Russ Brown, credibly testified on behalf of the respondents. Mr. Brown stated that on November 30, 2008, he observed the claimant reading magazines while he was supposed to be assisting the crane operator. Consequently, Mr. Brown directed the claimant to return to work. Moreover, late in the work-

day Mr. Brown instructed the claimant to shovel dirt. Mr. Brown issued this instruction because the employer's customer saw the claimant loafing on the job and threatened to withhold payment for the employer's services if the claimant did not perform any work. The claimant admitted that he objected to Mr. Brown's instruction to shovel dirt and questioned whether shoveling was an appropriate assignment for a machine operator.

Mr. Brown, credibly testified that he observed the claimant for 30 minutes after giving him the shovel and never saw him fall. In fact, Mr. Brown credibly stated the claimant did not actually lift any dirt with the shovel but instead used the shovel as if it were a broom.

Several written statements from claimant's co-workers were provided as exhibits. The majority of these statements corroborate Mr. Brown's testimony and establish that the claimant performed little work for most of the day. The statements further corroborate that the claimant was given a shovel at the end of the workday and instructed to shovel dirt. However, the statements varied on whether claimant actually used the shovel at all as well as how he used the shovel. None of these witnesses mentions that he saw the claimant fall while shoveling the dirt.

There is not credible or persuasive evidence that the claimant immediately reported any neck or back injuries to his supervisor. Rather the witness statements establish that after the conclusion of the workday, while the claimant and some of his co-workers were driving from the job site to their lodgings, the claimant mentioned that his back hurt and he believed he injured it while shoveling the dirt.

The claimant reported a back injury to Br. Brown on the evening of November 30, 2008. Mr. Brown took the claimant to the Memorial Hospital emergency room for treatment. At the emergency room the claimant gave a history of back and neck pain after shoveling, but did not mention any fall and consequent injury to his neck.

Dr. Joseph Oliver, M.D., examined the claimant on December 1, 2008. Dr. Oliver's notes do not mention that the claimant fell and injured his neck. Rather, the claimant gave a history that he "developed pain and tenderness in his neck and lower back" when "shoveling some heavy dirt yesterday." Dr. Oliver noted "mild tenderness of motion of the lumbosacral spine and cervical spine" and observed "no evidence of neurologic deficit in the upper or lower extremities." Dr. Oliver assessed acute lumbosacral and cervical muscle strains and released the claimant to full duty and full activity. Dr. Oliver noted that it appeared the muscle strains had "resolved."

The claimant apparently did not return to work on December 2, 2008. Instead he sought additional treatment from Dr. Oliver. However, Dr. Oliver declined to provide further treatment.

On December 2, 2008, the claimant sought further treatment from Dr. Ludwig Kroner, M.D. The claimant advised Dr. Kroner that he developed neck and back pain on November 30 "while shoveling some frozen dirt." Dr, Kroner's notes do not contain any mention that the claimant "fell." Further, the claimant advised Dr. Kroner that he had

been “fine” the previous day, but now his symptoms had recurred. Dr. Kroner noted that claimant reported “severe” pain although “he undresses himself with ease and is able to get up from the lying position with ease.” X-rays were performed that showed degenerative disc disease of the cervical spine and degenerative spondylolisthesis at L5-S1 and a facet spur at L-5 on the left. Dr. Kroner opined that that the claimant’s “symptoms seem somewhat exaggerated as compared to neurologic findings.” Dr. Kroner gave the claimant an “off work slip” and a cervical collar at the claimant’s request.

At hearing, the respondents presented the testimony of Dr. Marc Steinmetz, M.D. Dr. Steinmetz is an expert in occupational medicine. Dr. Steinmetz reviewed the claimant’s medical records as well as the witness statements concerning the claimant’s alleged injury. Dr. Steinmetz opined there is no likelihood that the claimant was injured on the job as he claims because there is a questionable mechanism of injury, the claimant is an unreliable and inconsistent historian, and the objective findings do not support the conclusion that the claimant was injured as he testified. Dr. Steinmetz detailed the findings and inconsistencies in the medical records that support his opinion.

The claimant failed to prove it is more probably true than not that he sustained any injury or injuries on November 30, 2008, while shoveling dirt at the employer’s job site. The claimant’s testimony that he experienced pain in his back while shoveling dirt, and that this pain caused him to fall and injure his neck is not credible and persuasive. The claimant’s testimony is found incredible for several reasons. First, the claimant bore animosity towards the employer because Mr. Brown had instructed the claimant to perform shoveling work that the claimant considered demeaning to his position as an equipment operator. Further, the claimant realized that his supervisor was unsatisfied with job performance because the supervisor had seen him loafing on the job and the customer had threatened to withhold payment for the employer’s services on account of the claimant’s conduct. The ALJ infers the claimant had a motivation to falsify this report of injury as a method of retaliating against the employer.

Other credible and persuasive evidence in the record contradicts the claimant’s testimony concerning the occurrence of the alleged injury. First, none of the claimant’s supervisor and coworkers that observed the claimant shoveling dirt ever saw him fall. Mr. Brown credibly testified that he observed the claimant for 30 minutes and never saw him fall. Moreover, Mr. Brown credibly testified that the claimant did not actually shovel the dirt, but instead used the shovel as if it were a broom. Finally, the claimant did not immediately report a back or neck injury to his supervisor or anyone else. This is true despite the fact that the claimant testified to an acute onset of back pain and experiencing a fall to the ground that resulted in neck pain. Instead, the evidence establishes the claimant did not begin complaining about his back until he was riding back to his lodgings with other workers.

The ALJ further finds that, on balance, the medical records tend to contradict the claimant’s testimony that he sustained an injury or injuries while shoveling dirt. Although the emergency room records from November 30, 2008, contain diagnoses of back and neck strains, there is no mention of any history of a fall. Similarly, Dr. Oliver’s notes from De-

cember 1, 2008 (one day after the alleged injuries) do not contain any mention of the fall to which the claimant testified. Moreover, Dr. Oliver released the claimant to full duty stating that, "his acute muscle strain and acute cervical strain have resolved." On December 2, 2008, the day after Dr. Oliver's release, the claimant sought treatment from Dr. Kroner. Again, Dr. Kroner's notes contain no mention of a fall. Dr. Kroner noted that the claimant reported "severe" pain, but undressed himself with ease and could rise from a lying position with ease. Dr. Kroner described the claimant's symptoms as "somewhat exaggerated as compared to neurologic findings."

The ALJ finds the opinions of Dr. Steinmetz to be credible and persuasive.

Evidence and inferences contrary to these findings are not credible and persuasive

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

The claimant alleges that he sustained injuries to his neck and low back on November 30, 2008, while shoveling dirt at his supervisor's instruction. The respondents argue the claimant failed to prove that he sustained any injuries arising out of and in the course of his employment. The ALJ agrees with the respondents.

The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The claimant must prove a causal nexus between the alleged need for medical treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As determined in Findings of Fact 12 through 16, the claimant failed to prove it is more probably true than not that he sustained any injuries arising out of and in the course of his employment while shoveling dirt. The ALJ finds the claimant's testimony that he felt back pain while shoveling, and that this pain caused him to fall and injure his neck, is not credible or persuasive. The ALJ has determined that the claimant has a motive to falsify the report of injury, that the alleged injury was not immediately reported, and that no other employee saw the claimant fall as he testified. The ALJ also determines, for the reasons mentioned in Finding of Fact 14, that the medical records significantly contradict the claimant's testimony concerning the alleged injuries. Finally, the ALJ finds the reasoning and opinions of Dr. Steinmetz to be credible and persuasive. For these reasons the claim for workers' compensation benefits must be denied and dismissed.

In light of the determination that the claimant failed to prove that he sustained any injuries arising out of and in the course of his employment the ALJ does not consider whether the medical treatment provided to the claimant was reasonable and necessary treatment.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. The claim for workers' compensation benefits in W.C. No. 4-780-027 is denied and dismissed.

DATED: May 18, 2009

David P. Cain
Administrative Law Judge